Supreme Court, U. S.
FILED
APR 7 1978
MICHAEL RODAK, JR., CL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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MARGARET KENNEDY, et al., - - - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, respectfully pray that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered on 29 December 1977 (a Petition for Rehearing was denied on 16 January 1978) in cause No. 77-1870.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of the Opinion is attached as Appendix 1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on 29 December 1977, affirming the Decision of the Three-Judge Court in holding that abstention was applicable to the facts and circumstances of this case. A Petition for Rehearing was filed and denied on 16 January 1978. Jurisdiction to review the Opinion and Judgment of the United States Court of Appeals is conferred upon this Court by 28 U.S.C. 1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether abstention is appropriate in the present case where the Illinois statutory scheme quite clearly prevents adult adoptees from obtaining access to their birth records absent a court hearing at which they must demonstrate some type of good cause and where the Petitioners, herein, adult adoptees, claim that their birth records should be opened to them on the same basis that such records are open to every other adult person.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Amendment 14 §1:

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title."

Ill. Rev. Stat. Ch. 4, §9.1-18 (1975):

"The word 'illegitimate' or the words 'born out of wedlock', or words importing such meaning, shall not be used in any adoption proceeding in any respect."

Ill. Rev. Stat. Ch. 111 1/2 §73-17 (1971):
The Vital Records Act

"(1) For a person born in this State, the State Registrar of Vital Records shall establish a new certificate of birth when he receives any of the following:

(a) A certificate of adoption as provided in Section 16[1] or a certified copy of the order of adoption together with the information necessary to identify the original certificate of birth and to establish the new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court ordering the adoption, the adoptive parents, or the adopted person.

(b) A certificate of adoption or a certified copy of the order of adoption entered in a court of competent jurisdiction of any other state or country declaring adopted a child born in the State of Illinois, together with the information necessary to identify the original certificate of birth and to establish the new certificate of birth; except that a new certificate of birth shall not be established if so requested by the court ordering the adoption, the adoptive parents, or the adopted person.

(c) A request that a new certificate be established and such evidence as required by regulation proving that such person has been legitimatized, or that the circuit court has determined the paternity of such a person.

(d) An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.

Each request for a new certificate of birth shall be accompanied by a fee of $5 and entitles the applicant to one certification or certified copy of the new certificate. If the request is for additional copies, it shall be accompanied by a fee of $2 for each additional certification or certified copy.

(2) When a new certificate of birth is established, the actual place and date of birth shall be shown; provided, in the case of adoption of a person born in this State by parents who were residents of this State at the time of the birth of the adopted person, the place of birth may be shown as the place of residence of the adoptive parents at the time of such person's birth, if specifically requested by them, and any new certificate of birth established prior to the effective date of this amendatory Act may be corrected accordingly if so requested by the adoptive parents or the adopted person when of legal age. The new certificate shall be substituted for the original certificate of birth:

(a) Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of the circuit court or as provided by regulation.

(b) Upon receipt of notice of annulment of adoption, the original certificate of birth shall be restored to its place in the files, and the new certificate and evidence shall not be subject to inspection or certification except upon order of the circuit court.

(3) If no certificate of birth is on file for the person for whom a new certificate is to be established under this Section, a delayed record of birth shall be filed with the State Registrar of Vital Records as provided in Section 14 or Section 15 of this Act [2] before a new certificate of birth is established, except that when the date and place of birth and parentage have been established in the adoption proceedings, a delayed record shall not be required.

(4) When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

STATEMENT OF THE CASE

On February 5, 1975, the Plaintiffs, seven adults who had been adopted as infants through the Illinois Courts and a not-for-profit Illinois Corporation, Yesterday's Children, filed a Complaint (Appendix 3) pursuant to 42 U.S.C. 1983 seeking declaratory and injunctive relief. They alleged a violation of their rights secured by the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution. (On February 11, 1975, an Amended Complaint was filed eliminating class aspects of the case.)

The preliminary Statement to the Complaint (pp. 2-3) summarizes the Plaintiffs' contentions. That statement reads as follows:

> "This is a Complaint filed individually and on behalf of all individuals who were adopted pursuant to Illinois law, who are now adults and who wish to obtain and/or have an opportunity to view, upon presentation of proper identification, records identifying their natural parents, background, extended family

and any other pretinent information. Illinois law presently allows any party to an adoption proceeding to move that the records be sealed and remain so absent a Court order. For over 25 years all adoption records have been customarily sealed in Cook County and for the past two years there has been a general court order to that effect. Traditionally information has been afforded to adoptees only upon proof of serious and probably hereditary medical problems. (However, even absent this custom and action the mere threat of action and the necessity for the plaintiffs to endure long and expensive litigation to determine their identity creates a breach of plaintiffs' constitutional rights.)

There are three sets of records the plaintiffs contend that they are automati ally entitled to view without court action: (1) the original file, (2) the original birth certificate, and (3) records from the private adoption agency if one were involved." (emphasis added)

The plaintiffs assert that the continued concealment by statutory fiat and state action of their identities deprives them of cherished constitutional protections and rights which are afforded to other citizens.

On October 24, 1975 in the United States District Court the Honorable Thomas R. McMillen,

District Judge, dismissed the Complaint because it "---involves a basic question of state public policy which has never been passed upon by State Court---" (p.3, October 25 Order).

On May 24, 1976 the United States Court of Appeals for the Seventh Circuit in an unpublished order (Appendix 2) remanded the cause to a Three-Judge Court to determine whether or not a substantial federal question had been presented (at p.2 of that Order). At page 5, the Court of Appeals, in dictum, analyzed those situations in which abstention applied and concluded that "---we believe the Trial Court erred in abstaining." Court opined further:

> "In light of Plaintiffs-Appellants' allegations we believe the trial court erred in abstaining. The two memorandum opinions by the trial judge indicated that he carefully reviewed the problem. We nevertheless reverse because the case involves fragile constitutional rights including First Amendment questions---.
>
> In this case we believe none of the three abstention situations are present.

Obviously, there is no state criminal proceeding so the third type of case noted is inapplicable. The first mentioned case (where a federal question might be mooted by a determination of state law) also does not apply in light of plaintiffs' allegations that they have previously unsuccessfully sought access to their files in the state courts. Nor does the present suit fall squarely within the second category of abstention. The state law and policy in Illinois has been established for years. Adoptees simply are not allowed access to their records unless they come within narrow exceptions. This litigation is a direct challenge to that policy based on alleged constitutional rights. Thus we do not believe this is a situation where principles fo comity and federalism would dictate abstention. The result sought in the instant case is not transcended by the importance of the state policy or the difficulty of the question presented."

After the remand, the Plaintiffs and Defendants submitted Briefs in support of and in opposition to their Motions for Summary Judgment and to Dismiss. On August 8, 1977 the Three-Judge Court denied the Motions for Summary Judgment and granted the Motion to Dismiss on grounds of abstention. In their decision, the

Three-Judge Court pointed out that the Seventh Circuit's language on abstention was dictum (p.10), relying primarily upon the then recently decided cases of Bellotti v. Baird, 428 U.S. 132 (1976) and Ohio Bureau of Employment Services et al. v. Hodory, 431 U.S. 471 (1977).

On December 29, 1977 the United States Court of Appeals affirmed the Three-Judge Court's decision on abstention. (Appendix 1).* The Court of Appeals also relied primarily upon Ohio v. Hodory, Supra and Bellotti v. Baird, Supra to justify abstention.

> "---it appears that abstention to allow more expanded consideration by the Illinois courts may 'materially alter the constitutional issue presented.'" Citing Ohio v. Hodory, Supra at p.481 (p.7, Appendix 1, 7th Cir. Dec.)

* A Petition for Rehearing was denied on January 16, 1978.

However, the fact which caused the Seventh Circuit to abstain was an unreported opinion by the Circuit Court of Cook County after the Briefs had been filed in the Seventh Circuit. The Seventh Circuit pointed out:

> "It is thus apparent that the Daniel Doe court would not limit the unsealing of adoption records to cases where adoptees can show 'a probably and serious hereditary problem' or 'critical medical reasons,' as claimed by plaintiffs (BR. 3, 5) or where 'genetic, medical, psychological or other problems manifest themselves as requiring such information or where neither party objects to the disclosure.' Instead in Daniel Doe the following standard has seemingly been read into the statutes and General Order: the petitioner must show by a preponderance of the evidence that, as an adult, he or she has a real and immediate need for such records, and if such a showing is made, the biological and adoptive parents in order to avoid unsealing must show by a preponderance of the evidence that substantial harm will transpire if the relief requested is

granted." (App. 1,p.7).

The United States Court of Appeals for the Seventh Circuit applied abstention because:

> "Despite this construction by one state trial court, it appears that abstention to allow more expanded consideration by the Illinois courts may 'materially alter the constitutional issue presented" (Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 481), and that the benefits of such abstention are not 'too speculative to justify or require avoidance of the question presented.' Id. The fact that a state trial judge read a type of good cause requirement into the statutes and General Order does not remove their ambiguity for two reasons. First, good cause is subject to many diverse interpretations. See Bellotti v. Baird, 428 U.S. 132, 143-146, 148. While it could be argued that Judge Schneider offered a more specific standard than good cause, even that arguably more specific standard does not contraindicate the benefits of abstention because it merely substitutes for good cause several other broad terms that were not

defined in the unreported nisi prius opinion and will have to await further interpretation.---"

"Second, even if Judge Schneider's unappealed opinion did define conclusively all the unclear standards, until an Illinois reviewing court (which will of course be fully competent to adjudicate constitutional claims, Doran v. Salem Inn, Inc., 422 U.S. 922, 930) considers the statute and the General Order, their construction will remain in doubt despite Judge Schneider's persuasive opinion. As the Second Circuit held in Connecticut State Federation of Teachers v. Board of Education, 538 F2d 471, 485 (1976), decisions by state trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate, at least in the absence of a similar decision by the state's appellate courts. Cf. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)."* (App.1, pp.8,9)

* The Doe case which did not raise the constitutional question was not appealed by either party. The Doe decision is included as Appendix 2.

REASONS FOR GRANTING THE WRIT

The decision below requires review because it interjects new and much more stringent standards into the doctrine of abstention - that is, where a state trial court in an unreported, unappealed opinion interpreted the complained of Illinois statutory scheme, the opinion below asserted that abstention is mandated in order to allow Illinois courts the opportunity to further review and interpret the statutory scheme even though:

1. The state opinion (Appendix 2) not only confirms the Plaintiffs' interpretation of the Illinois statutory scheme but actually placed even more stringent standards on those circumstances under which adult adoptees could have access to their records.

2. Neither the Seventh Circuit in the opinion below nor the Defendants ever attempted to explain or argue how review by the Illinois courts could save or reserve the constitutional question.

3. The constitutional question was never raised, argued or decided in the unreported

Illinois decision.

> Further this case affords this Court the opportunity to clarify the status of abstention insofar as where, when and under what circumstances abstention should be required in order to allow state courts the opportunity to evaluate, interpret and, where necessary, pass upon constitutional issues of the statute itself.

The crux of the Plaintiffs' Complaint is that the Illinois statutory scheme effectively denies them the opportunity to review their original courts and birth records and violates their constitutional rights (as set forth in the Constitutional Analysis Section below) for two reasons: (1) "traditionally information has been afforded to adoptees only upon proof of serious and probably hereditary medical problems," and (2) "---even absent this

custom and action the mere threat of action and the necessity for the Plaintiffs to endure long and expensive litigation to determine their identity creates a breach of Plaintiffs' constitutional rights." (P.2, Complaint).

The Decision in the court below concentrated only upon the first of the above two reasons - that is , the standards set forth by the statutory scheme - while both making light of and misinterpreting the second part of the Plaintiffs' claim. (See pp. 9-10).

The holding of the court below is an unwarranted, unsound and precarious extension of the abstention doctrine. The decision quite clearly holds that abstention is mandated when a State Trial Court renders an interpretation of an attacked state statute even though that

interpretation underscores the unconstitutionality of that statute and is consistent with Plaintiffs' claim. However, this Court seems previously to have interpreted abstention much more narrowly:

> "---But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." (Citing from Harman v. Forssenius, 380 U.S. 528, 534 (1965)). Where, the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce and protect every right granted or secured by the Constitution of the United States,'" (Citing from Robb v. Connolly, 111 U.S. 624, 637 (1884), Kusper v. Pontikas, 414 U.S. 51 (1973).

Yet in relying upon the Circuit Court of Cook County for abstaining the Court below observed that "[T]he fact that a state trial judge read a type of good

cause requirement into the statues and General Order does not remove their ambiguity for two reasons." (P.8). The two reasons according to the Court were:

(1) Good cause is subject to many diverse interpretations and "while it could be argued that Judge Schneider offered a more specific standard than good cause, even that arguably more specific standard does not contraindicate the benefits of abstention because it merely substitutes for good cause several other broad terms that were not defined in the unreported nisi prius opinion and will have to await further interpretation." (at P.8).

(2) The second reason why the Seventh Circuit believed abstention should lie was that even if the Circuit Court of Cook County's unappealed opinion "did define

conclusively all unclear standards" that construction would remain in doubt because "decisions by State trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate, at least in the absence of a similar decision by the State's appellate courts." Citing Commissioner v. Estate of Bosch, 387 U.S. 467 (1967) and (at footnote 11) distinguishing Carey v. Sugar, 425 U.S. 73, 78 (1976).

Of course, whether the standard to be applied is serious and probably hereditary medical problems or the more strict one employed by the Circuit Court of Cook County, the question still remains whether there is any interpretation of the statutory scheme by the State's courts that could save the constitutional question.

Although the Court below argued that the standards needed further interpretation and, if possible, an appellate interpretation, the Seventh Circuit never attempted to set forth how an Illinois Court could obviate the constitutional question. Nor did the Defendants in their many Briefs before the one judge and Three-Judge Court and in their two Briefs in the United States Court of Appeals even attempt to demonstrate just how the doctrine of abstention would allow the Illinois courts to interpret the statutory scheme in such a manner as to obviate the constitutional question. A close reading of all the decisions and Briefs makes it clear that what both the Defendants have argued and what the Courts have indicated (with the exception of the May, 1976 Opinion of the Seventh Circuit) is that there simply is no constitutional question.

While the Doe case demonstrated that the standards by which an adult adoptee could obtain his records were stringent it also clearly demonstrated the burdensome ordeal an adult adoptee is subjected to:

> "A hearing was held wherein the petitioner introduced testimony that he suffered severe emotional problems. Petitioner testified that he had been seeing a psychiatrist for about thirteen (13) years. He had overdosed on pills on seven occasions. On the last occasion he was in a coma for about 36 hours.
>
> Expert testimony of Dr. John Utley, M.D., a board certified psychiatrist, showed that Doe had suffered severe depressions and anxiety. He testified that when the petitioner overdosed on drugs it was an intentional act of self-destruction. The Doctor testified further that while finding the petitioner's natural parents would not solve all his emotional problems, it would be beneficial.
>
> Dr. Edward Kelleher, M.D., a board certified psychiatrist,

> testified for the State. He stated that he had conducted two interviews with Doe. His diagnosis was that the petitioner had a schizoid type personality and that he was suffering from a mixed type of neurosis. When asked whether the information requested might aid in the petitioner treatment, the doctor replied that there was no assurance that it would, but conversly there was no certainty that it would not help." In the Matter of Daniel Doe, 76 CO 2436 (Cir. Ct. of Ck. Cty.). (App.2, p.)

Daniel Doe, who had an obvious real and immediate need, had to endure the humiliation of public hearings and cross-examination concerning his schizophrenia and suicide attempts along with the financial burden of retaining counsel and legal proceedings. Once he demonstrated that he had a real and immediate need for the records he had to endure the further humiliation of the Court notice to his adoptive parents informing them of Doe's case and wishes to

determine if the parents had any objection.

It is obvious that the Plaintiffs, none of whom have what could be termed as a real and immediate need (Para. 28, Complaint) could obtain their records. But, again, this merely begs the question as to why the Plaintiffs must be forced to retain counsel and go through proceedings in order to try to prove they have a real and immediate need.

The decision of the Court below appears to have misjudged the import of Bellotti v. Baird, Supra and Ohio Bureau of Employment Services v. Hodory, Supra.

In Bellotti v. Baird, Supra, the State of Massachusetts went to great lengths both before the Three-Judge Court and in this Court to demonstrate that the statute could be interpreted to save the constitutional question. Neither the State of Illinois nor the Court below

ever attempted to indicate just how the constitutionality of the Illinois statutory scheme can be saved in the instant case. Indeed, the Court below placed its entire reliance for abstention upon the fact that an Illinois court had interpreted the statute while admitting that that court (the Illinois Trial Court) had interpreted the statute even more strictly than the Plaintiffs had alleged in their Complaint (see P.8, Decision of Seventh Circuit - Appendix 1).

In Ohio Bureau of Employment Services v. Hodory, Supra this Court recognized the continued vitality of the Pullman decision (Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)) when it stated:

> "---As has been noted, Pullman abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or materially alter the constitutional issue pre-

sented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented. That point has been reached and surpassed here. We conclude that Pullman abstention is not appropriate."

There are no facts present in the instant case which would allow for an elimination or alteration of the constitutional question. Certainly any "possible benefits of abstention (are) ---too speculative to justify or require avoidance of the constitutional question presented."

II

A. THE CONSTITUTIONAL QUESTION RAISED IN THE COMPLAINT IS SUBSTANTIAL AND MANDATES FEDERAL JURISDICTION.

The right to seek out and obtain information irrespective of whether such information is of a personal or societal benefit has found protection within the right of privacy. Carey v. Population Services, 431 U.S. 678, (1977) and in the First Amendment right to seek out information. Stanley v. Georgia, 394 U.S. 557 (1969); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 390 (1969). In Griswold v. Connecticut, 381 U.S. 479 (1964), Mr. Justice Douglas writing the Court's Opinion pointed out that the right of freedom of speech and press "---includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read

(Citations) and freedom of inquiry, freedom of thought and freedom to teach (Citations)---." Griswold v. Connecticut, 381 U.S. 479, 482 (1964). See Generally, Haeman, Speech and Privacy, Is There A Right Not To Be Spoken To? 67 N.W.L. Rev. 153 (1972) and Note, The Adult Adoptees ---Right To Know His Natural Heritage, 48 S. Cal. L. Rev., 1196, 1204-1210 (1975).

B. THE STATE HAS NO COMPELLING PURPOSES, NOR INTEREST IN, DENYING ADULT ADOPTEES EACH ACCESS TO THEIR BIRTH AND COURT RECORDS.

For the state to deny adoptees a clear expression of their First Amendment rights requires a statutory purpose reflecting the promotion of a compelling governmental interest which in turn must be carefully

scrutinized by the court. Roe v. Wade, 410 U.S. 113, 155 (1973).

Petitioners admit that it is compelling to prevent minor adoptees from having access to their birth and court records in order to allow adoptive parents the protection against the intrusion and interference by "repentant" natural parents.*

* This would also seem to be the reason why the Illinois State Legislature in 1945, for the first time, mandated for the sealing of birth records. Prior to that time there were no such provisions in Illinois laws and between 1945 and 1961 birth records were sealed to all but the adult adoptee. Ill. Rev. Stat. Ch. 48 (a), (1949 and previous years). It was not until 1961 that the Legislature mandated that adult adoptees could not view their birth records.

Of course, no matter how compelling these reasons may be when an adoptee is a minor they become non-existent once the adoptee reaches majority. Roe v. Wade, Supra at P.162.

Other conceivable purposes for the anctioning of adoption records are:

1. Potential adoptive parents will not adopt if their adoptive children can discover something about their natural heritage 18 years later;

2. Natural parents may not be as willing to give up their children for adoption if they realize that later in life the child could discover them; and

3. Natural parents have certain privacy rights to prevent their children from viewing their court and birth records.

However, an analysis of these reasons which is inappropriate for purposes of this Petition demonstrates no compelling justification.

C. EQUAL PROTECTION VIOLATIONS

As was pointed out above, the interest of the adult adoptee in determining his or her natural identity including all that entails - knowledge of their ethnic origins, ancestors, identity and possible whereabouts of parents, brothers, sisters, uncles, aunts, cousins, grandparents, etc. would certainly seem to be fundamental. Moreover, classification of adoptees as the only group within the population who can not have access to their original birth records is the result of an accident which occurred shortly after their birth and at a stage in life when they obviously had no control over their destiny. Adoption, like sex (Frontiero v. Richardson, 411 U.S. 677, 686 (1974)), race (Loving v. Virginia, 388 U.S. 1 (1966)), alienage

(Graham v. Richardson, 403 U.S. 376 (1971)), birth (Levy v. Louisiana, 319 U.S. 79 (1968)) and national origin (Korematsu v. U.S., 323 U.S. 244 (1944)).

As was demonstrated above, none of the conceivable purposes for the classifications are able to stand the test of strict scrutiny. It would therefore seem that the statutory scheme in question would fall on both equal protection as well as right to access to information grounds.

CONCLUSION

For the reasons above stated the Petitioners respectfully ask that this Court issue a Petition for Writ of Certiorari directed to the United States

Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 7 1978
MICHAEL RODAK, JR., CLERK

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MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

APPENDIXES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chicago, Illinois 60602
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO._____

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

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APPENDIX 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1870

YESTERDAY'S CHILDREN, et al.,

Plaintiffs-Appellants,

v.

MARGARET KENNEDY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois. No. 75 C 378
Wilbur F. Pell, Jr., Thomas R. McMillen and Alfred Y. Kirkland, *Judges.*

ARGUED NOVEMBER 1, 1977—DECIDED DECEMBER 29, 1977*

PETITION FOR REHEARING DENIED JANUARY 16, 1978

Before CUMMINGS and BAUER, *Circuit Judges,* and GRANT, *Senior District Judge.***

CUMMINGS, *Circuit Judge.* Plaintiffs are eight adults who were adopted as infants and Yesterday's Children, which is a not-for-profit Illinois corporation consisting of approximately 6,000 adults who were also adopted as infants. Their civil rights complaint was brought under 42

* This appeal was originally decided by unreported order on December 29, 1977. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

U.S.C. § 1983 against four Illinois officials[1] and the presiding judge, County Division, of the Circuit Court of Cook County. Plaintiffs sought injunctive relief and a declaratory judgment that two Illinois statutes[2] violate the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments because they prevent the individual plaintiffs from ascertaining their natural parents' identity. They also sought a declaratory judgment that defendant officials and officials of private agencies acting under color of state law violate those amendments by preventing plaintiffs from ascertaining the identity of their natural parents. The individual plaintiffs claim that they were denied access by defendants to the names of their natural parents or, in one instance, the name of her natural brother.[3] Seven of the named plaintiffs are members of Yesterday's Children. None of the plaintiffs sought any relief in the Illinois courts.

According to plaintiffs, Illinois has maintained a statutory and "actual policy" of preventing adopted children from discovering the names and circumstances of their natural parents and blood relatives. Similarly, adoption agencies formalized by Illinois statute and licensed by the employees of the Illinois Department of Children and Family Services have denied adoptees this information. Adoptees have been able to review their adoption records "only if they can demonstrate critical medical reasons to justify their request" (Complaint par. 27). Plaintiffs claim that their constitutional rights have

[1] The Director of the Illinois Department of Children and Family Services, the Director of the Illinois Department of Public Health, the Clerk of Cook County, and the Attorney General of Illinois.

[2] Ill. Rev. Stat., ch. 4, § 9.1-18 and ch. 111½, § 73-17(2)(a) and (4).

[3] In discovery, two of the plaintiffs revealed that they had uncovered the information by their "own methods." If the plaintiffs were seeking damages this admission might be significant (cf. *Carey v. Piphus,* 545 F.2d 30 (7th Cir. 1976), certiorari granted, 45 LW 3690) but defendants have not argued that this admission should affect plaintiffs' request for declaratory and injunctive relief.

been violated by the two statutes in question,[4] by a General Order entered by the presiding judge of the County Division of the Circuit Court of Cook County on February 21, 1974, which provides that "* * * all adoption files in the offices of the Clerk of the Circuit Court shall be impounded and shall be released only upon an order issued from the County Division of the Circuit Court," and "by the action of state officials and private child adoption agencies acting under the color of state law" (Complaint par. 32).

The constitutional violations are alleged as follows (Complaint pars. 33-35):

> "The State of Illinois has denied the Plaintiffs their Fourteenth Amendment rights to the equal

[4] The statutory provisions assailed in the complaint are as follows:

Ill. Rev. Stat., ch. 4, § 9.1-18:

> Records confidential. The word 'illegitimate' or the words 'born out of wedlock', or words importing such meaning, shall not be used in any adoption proceeding in any respect.
>
> Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may, order that the file relating to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order.

Ill. Rev. Stat., ch. 111½, § 73-17(2)(a):

> Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation.

Ill. Rev. Stat., ch. 111½, § 73-17(4):

> When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

> protection of the laws by preventing their access to information concerning their background, based on the suspect classification of their status as adoptees.
>
> "The Plaintiffs' rights to acquire useful information (including the right to determine their natural heritage) have been violated. These liberties are protected by a penumbra of rights emanating from the Bill of Rights, specifically the First, Fifth, Ninth and Fourteenth amendments of the U.S. Constitution.
>
> "The Plaintiffs' rights to be free from involuntary servitude as protected by the Thirteenth Amendment to the U.S. Constitution have been violated by the statutes and actions complained of. As adopted infants the Plaintiffs were placed into a chattel status—an unfortunate but explicable happenstance. However, the state's continued insistance [sic] on maintaining that chattel status even into adulthood and until death violates the Plaintiffs' Thirteenth Amendment rights."

In June 1975, the district judge to whom the case was originally assigned declined to convene a three-judge court on the ground that this General Order of the Circuit Court of Cook County "lies at the heart of the matter" and should be reviewed before any statutory question need be reached. In October 1975, he dismissed the complaint without prejudice on the ground of abstention because "the complaint involves a basic question of State public policy which has not been passed upon by the State courts, *i.e.*, whether the plaintiffs should generally be deprived of access to the record of their personal origins."

The dismissal was appealed and in May 1976 this Court handed down an order holding that a three-judge court was required to hear plaintiffs' constitutional challenge because the complaint "presented a substantial

federal question." By dictum,[5] the panel considered abstention to be inappropriate.

In August 1977, a three-judge district court granted defendants' motions to dismiss the action without prejudice on the grounds of abstention.[6] The opinion reasoned that the Illinois courts could "apply the [two] statutes in such a way as to withstand constitutional attack" (mem. op. 6). To support abstention, the opinion relied principally on *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471; *Bellotti v. Baird*, 428 U.S. 132; and *Juidice v. Vail*, 430 U.S. 327.[7] We have jurisdiction of this appeal from that decision because the three-judge district court did not reach the merits of plaintiffs' constitutional arguments (*MTM, Inc. v. Baxley*, 420 U.S. 799), nor do we. Our affirmation is based solely on abstention.

I. *Analysis of the State Court Construction of Challenged Statutes and General Order.*

After this appeal was filed, the Circuit Court of Cook County, County Division, County Department, handed down an unreported opinion dealing with the above statutory provisions in *In the Matter of Daniel Doe*, 76 Co 2436 (November 22, 1977). In that case, an emotionally disturbed adoptee, represented by the same counsel as these plaintiffs, sought knowledge of his familial background at the suggestion of his psychiatrist, and the

[5] Even if the dictum were somehow considered binding at the time, the presence of intervening Supreme Court decisions (*e.g., Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471; *Bellotti v. Baird*, 428 U.S. 132) would justify a second look at the abstention question. See 1B Moore's *Federal Practice* ¶0.404[2]; cf. *Bradley v. Richmond School Board*, 416 U.S. 696.

[6] The Association for the Protection of the Adoptive Triangle was permitted to file a brief *amicus curiae* below. It has also filed an *amicus* brief here urging affirmance.

[7] As additional support, the opinion cited *Colorado River Water Conservation District v. United States*, 424 U.S. 800; *Trainor v. Hernandez*, 431 U.S. 434; and *Wooley v. Maynard*, 430 U.S. 705. See also *Huffman v. Pursue, Ltd.*, 420 U.S. 592.

court decided that the adoption record should be released on the following conditions:

> "It is therefore ordered that ..... be appointed as investigator and friend of the court to investigate this matter. He shall contact the biological parents and the adoptive parents, give them notice of the pendency of this proceeding and that the records will be released if the evidence of substantial harm is not presented to this Court. The biological parents and the adoptive parents will be given leave to intervene and show by a preponderance of the evidence that substantial harm will transpire if the relief requested is granted. Absent such a showing, this Court will order the adoption records be opened for petitioner's examination, and the original birth certificate be opened for the petitioner's inspection. Ill. Rev. Stat. Ch. 4, § 9.1-18, Ch. 111½ § 73-17.
>
> "If the investigator is unable to locate the biological parents or the adoptive parents within a reasonable period of time, the petitioner will be required to publish notice of the pendency of this proceeding for 30 days in a publication of general circulation. If no appearance is made, and no showing of substantial harm is presented, the relief requested will be granted."

In the well-reasoned opinion, the state court judge noted that no Illinois appellate court had yet interpreted the statutory provisions in question but that most states requiring the sealing of adoption records permit the unsealing of those records upon a showing of good cause. Judge Schneider observed that in Scotland adoption records have been open to any adoptee who has reached the age of 17, and that Parliament recently enacted a similar law for England and Wales. After noting the arguments that the Illinois statutes might violate the Due Process and Equal Protection clauses of the Fourteenth Amendment, be inconsistent with the penumbra of rights emanating from the Bill of Rights in the Federal Constitution or be unconstitutionally vague, the court concluded that under the Illinois statutes, the rights of adoptees, their biological parents, and their

adoptive parents have to be weighed against "possible detrimental effects." Consequently, the court adopted the above procedure "to balance those rights, and on the basis of the unique facts in each case, arrive at an equitable and just solution."

It is thus apparent that the *Daniel Doe* court would not limit the unsealing of adoption records to cases where adoptees can show "a probable and serious heriditary problem" or "critical medical reasons," as claimed by plaintiffs (Br. 3, 5) or where "genetic, medical, psychological or other problems manifest themselves as requiring such information or where neither party objects to the disclosure."[8] Instead in *Daniel Doe* the following standard has seemingly been read into the statutes and General Order: the petitioner must show by a preponderance of the evidence that, as an adult, he or she has a real and immediate need for such records, and if such a showing is made, the biological and adoptive parents in order to avoid unsealing must show by a preponderance of the evidence that substantial harm will transpire if the relief requested is granted.

II. *Application of Abstention Principles*

Despite this construction by one state trial court, it appears that abstention to allow more expanded consideration by the Illinois courts may "materially alter the constitutional issue presented" (*Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481), and that the benefits of such abstention are not "too

[8] This pre-*Daniel Doe* quotation appears in plaintiffs' principal brief (at pp. 4, 10) and in their reply brief (at pp. 2, 3) and is taken from p. 7 of defendants' memorandum below and from p. 15 of their brief here. Although this is one possible interpretation of the statutes and General Order, both parties' use of the phrase "or other problems" indicates that unsealing may be appropriate in other undefined cases or perhaps when good cause is shown. At oral argument, defendants suggested that a court might interpret a plaintiff's adulthood to constitute good cause and that a standing court order could so provide, or a regulation under Ill. Rev. Stat., ch. 111½, § 73-17(2)(a). We leave it to the Illinois courts to determine which of the many possible standards and definitions will be applied.

speculative to justify or require avoidance of the question presented." *Id.* The fact that a state trial judge read a type of good cause requirement into the statutes and General Order[9] does not remove their ambiguity for two reasons. First, good cause is subject to many diverse interpretations. See *Bellotti v. Baird*, 428 U.S. 132, 143-146, 148.[10] While it could be argued that Judge Schneider offered a more specific standard than good cause, even that arguably more specific standard does not contraindicate the benefits of abstention because it merely substitutes for good cause several other broad terms that were not defined in the unreported *nisi prius* opinion and will have to await further interpretation. The *Daniel Doe* opinion does indicate that on the facts there, the petitioner must show by a preponderance of the evidence that he has a real and immediate need for the information; and if such a showing is made, the biological and adoptive parents must show by a preponderance of the evidence that substantial harm will result if the information is released. However, the opinion offers little reasoning for finding that the petitioner had shown a "real and immediate need," and given the procedural posture of the case, the parents had

[9] As the three-judge court explained, absent the Illinois statutes, the General Order may not reflect state-wide policy and therefore might not be a proper subject for review by that tribunal (mem. op. 7). See *Board of Regents v. New Left Education Project*, 404 U.S. 541, 544 n. 2.

[10] Although Justice Blackmun's opinion for the Court in *Bellotti* discussed abstention in order to allow states to interpret "unconstrued" statutes, 428 U.S. at 147, we do not view that language as prohibiting abstention in cases in which statutes have been construed by a state court but remain unclear. In *Kusper v. Pontikes*, *infra*, for example, the Supreme Court was asked to abstain from a challenge to an Illinois statute that already had been construed by Illinois courts. While the Court declined to abstain, instead of basing its decision on the rationale that the statute already had been construed, its decision was based on the fact that after examining the statute in light of the state opinion, the Court found it sufficiently clear. See *Carey v. Sugar*, 425 U.S. 73. Here, however, our examination of state law reveals that it is sufficiently unclear to be susceptible of an interpretation that would alter the constitutional issue.

not yet made a showing, and therefore the term "substantial harm" was left undefined.

Second, even if Judge Schneider's unappealed opinion did define conclusively all the unclear standards, until an Illinois reviewing court (which will of course be fully competent to adjudicate constitutional claims, *Doran v. Salem Inn Inc.*, 422 U.S. 922, 930) considers the statute and the General Order, their construction will remain in doubt despite Judge Schneider's persuasive opinion. As the Second Circuit held in *Connecticut State Federation of Teachers v. Board of Education*, 538 F.2d 471, 485 (1976), decisions by state trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate, at least in the absence of a similar decision by the state's appellate courts.[11] Cf. *Commissioner v. Estate of Bosch*, 387 U.S. 456.

Given this need for appellate review of the *Daniel Doe* interpretation and the ambiguities that remain despite that interpretation, this case is one in which the state courts by further explicating the standards for unsealing may construe the statutes and General Order so as to materially alter plaintiffs' constitutional challenge. See *Kusper v. Pontikes*, 414 U.S. 51, 54-55; *Harrison v. NAACP*, 360 U.S. 167, 177. Like the statute in *Bellotti*, the Illinois statutes and General Order challenged here and the standards of proof implied therein are "susceptible" to so many different interpretations,[12] requirements and applications that "it is impossible to define precisely the constitutional issue presented." 428 U.S. at 148.

Plaintiffs seek to avoid abstention by arguing that their case includes a claim that merely being required to appear in court infringes their right to information and their right to equal protection and that therefore no conceivable state court construction would materially

[11] The Supreme Court's reference to reported decisions of two New York trial courts in *Carey v. Sugar*, 425 U.S. 73, 78, is distinguishable because those decisions were reported and seemed to follow a trend first begun by the state's highest court. See *id.*

[12] See *e.g.*, note 8 *supra*.

alter that claim. However, a fair reading of plaintiffs' complaint reveals that the essence of that complaint disputes the standards on which courts could release the information and not the requirement of a court appearance. See *e.g.* ¶24. Had this Court in its May 1976 order in this case understood the complaint to be merely objecting to the requirement of a court appearance, judging from its reasoning it probably would have declined to convene a three-judge court based on the lack of a substantial federal question.

Indeed, not only does this case satisfy the *Hodory* branch of abstention, but it is arguably a case in which there are "~~different~~ questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District, supra*, at 814.

Under either branch of abstention, unlike the plaintiffs in *Vickers v. Trainor*, 546 F.2d 739 (7th Cir. 1976), plaintiffs here have not demonstrated that "substantial personal consequences" (see *Bellotti v. Baird, supra*, at 151) would result from whatever delay a state adjudication would entail.[13] Unfortunately, *Daniel Doe* is not the

[13] It does not minimize plaintiffs' claims to note that those claims are less immediate than the need for an abortion at issue in *Bellotti* or even the daily confinement at issue in *Vickers*. In any event, *Bellotti* leaves unclear whether a court in abstaining need make a specific inquiry into the issue of delay and if so on whom the burden of proof should be placed. See 428 U.S. at 143 n. 10. On the facts of this case and in the absence of argument by the plaintiffs, we decline to hold that any harm of delay affects our conclusion on the need for abstention.

final Illinois word in construing these statutes and General Order, and at least in the absence of equitable considerations to the contrary it is advantageous in this case to allow the state courts of review to define the statutes and General Order further. Therefore, we agree with the court below that it was inappropriate for it to reach the merits of this controversy.

Order affirmed.

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APPENDIX 2

IN THE CIRCUIT COURT OF
COOK COUNTY, COUNTY DEPARTMENT
COUNTY DIVISION

In the Matter of)
) 76 Co 2436
Daniel Doe)

ORDER

Daniel Doe an adoptee, petitioned this Court for the release of all original documents which might assist him in learning the identity and whereabouts of his natural parents. His petition alleged that he had been under intensive psychotherapy for some eleven years. Further, that his psychiatrist believed that much of the emotional distress and insecurity the petitioner felt would be alleviated if he received the requested information. The State of Illinois, represented by Bernard Carey, State's Attorney of Cook County responded to the petition.

A hearing was held wherein the

petitioner introduced testimony that he suffered severe emotional problems. Pettitioner testified that he had been seeing a psychiatrist for about thirteen (13) years. He had overdosed on pills on seven occasions. On the last occasion he was in a coma for about 36 hours.

Expert testimony of Dr. John Utley, M.D., a board certified psychiatrist, showed that Doe had suffered severe depressions and anxiety. He testified that when the petitioner overdosed on drugs it was an intentional act of self-destruction. The Doctor testified further that while finding the petitioner's natural parents would not solve all his emotional problems, it would be beneficial.

Dr. Edward Kelleher, a board certified psychiatrist, testified for the State. He stated that he had conducted

two interviews with Doe. His diagnosis was that the petitioner had a schizoid type personality and that he was suffering from a mixed type of neurosis. When asked whether the information requested might aid in the petitioner's treatment, the doctor replied that there was no assurance that it would, but conversly there was no certainty that it would not help.

This Court finds jurisdiction to order adoption records impounded or to release such impounded records in the Adoption Act. The statute provides:

> . . . the Court may order that the file relating to such proceeding shall be impounded by the Clerk of the Court and shall be opened for examination only upon special order of the Court which shall name the person or persons who are to be permitted

to examine such file. . .
Ill. Rev. Stat. Ch. 4 §9.1-18.*

A substantailly similar provision is contained in the Vital Records Act for the inspection or certification of an original birth certificate. Ill. Rev. Stat. Ch. 111 1/2, §73-17.

While no court of appellate jurisdiction has interpreted this statute in Illinois, the great majority of jurisdictions today have a similar statute which requires sealing the records of adoption proceedings. See Note, The Adoptees Right to Know His Natural Heritage, 19 N.Y.L.F. 137 (1973). Generally, these statutes prohibit access to the identity or possible whereabouts of the biological

* This provisions of the Adoption Act was substantially the same in 1946 when Daniel Doe was adopted. However, his adoption records were impounded on the motion of the adoptive parents in 1955.

parents except by order of court.

The sealing of adoption records serves three main purposes. First, it protects the privacy rights of the adoptive parents, and assures them they will not be subjected to interference from the natural biological parents. This is especially important during the formative years of child development. Sealed Records In Adoptions: The Need for Legislative Reform, 21 Catholic L. 211, 212 (1975). Second, it protects the biological parents from any stigma that may flow from the adoption process. Id. The interest these sealed records statutes were primarily designed to protect, however, is the psychological parent-child relationship between the adoptee and the adopting parents. Id at 213. These statutes further protect the child by isolating him from any stigma that may attach to his

birth. Id.

Most of these sealed records laws require a showing of "good cause" before the records may be unsealed. (c.f. See Alabama and Kansas law which allow the adoptee to see his original birth certificate and Virginia and South Dakota which allow the adoptee to read the proceedings up reaching majority.) The standards for court orders are usually not defined beyond a vague statement of "good cause" or "in the Court's discretion." See Sealed Records, Supra at 214. Ill. Rev. Stat. Ch. 4, §9.1-18 (1975). Courts in general have been reluctant to open these records. In Re Wells, 281 F2d 68 (1960, (biological mother denied access because she did not prove fraud); In Re Minicozzi, 273 N.Y. S.2d 634 (1966), (alleged father needed records for defense of civil suit).

Two recent New York Surrogate's Court decisions took what may be a more logical approach to these cases. New York required "good cause" to open sealed adoption records. N.Y. Dom. Rel. Law. §114 (1975). The first case, Matter of Ann Carrol S., 172 N.Y.L.J. 31, August 13, 1974 at 12, col. 6 (Sur. Ct. Bronx Co.) involved a forty year old woman who had been adopted in 1937. She had carried on a relatively normal existence during her adult life. However, expert testimony was offered that she was recently having trouble with her social adjustment because of an overriding desire to find her biological parents. This social adjustment problem had become manifest when she suddenly terminated her engagement with the man whom she was to marry. Id.

The Court engaged in a weighing

process. The petitioner adoptee had no adoptive siblings nor was there any evidence of natural brothers or sisters. Her adoptive parents were dead. There was no evidence of other natural relatives that would be adversely effected. The Court therefore concluded that although this was not the strongest case of good cause, some emotional benefit might accrue to her by revealing the information in the court files. Since the evidence was so slight, of any possible injury to those other than the petitioner, this Court unsealed the files.

A second case, Estate of Katrina-Maxtone-Graham, 173 N.Y.L.J. 66, Apr. 7, 1975, at 17, col. 4 (Sur. Ct. N.Y. Co), involved in a slightly more complicated factual situation. The petitioner had requested copies of her adoption file

from the Children's Aid Society complaining of mental distress from her need to know of her biological roots. The trial judge after hearing the case gave an order requiring the Society to hire a private investigator to attempt to locate the petitioner's mother. The investigator was paid by the petitioner, but was to report only to the Society. When the investigator found the mother, he was to report back to the Society which would then notify the Judge. The Court would then appoint an attorney to interview the mother, advise her of her rights, and attempt to obtain consent to open the files. If the natural mother refused to consent, only then would the Court make a final decision on whether the file should be opened and the petitioner advised of its contents. The order was appealed and af-

firmed. 358 N.Y.S. 2d 663 (1974). The investigator failed to find the mother, but the petitioner, through independent means, did. The mother consented to the disclosures.

The Society protested that the entire file should be released because it contained names of foster parents that had cared for the petitioner before adoption. The petitioner claimed a right to the full history in the file. The Court held that the needs of the Society for keeping records of foster parents confidential outweighed the petitioner's needs. Since the foster parents had no contact with the petitioner for over thirty years, this Court ruled that the names should be deleted before the files was released. Only the names of the biological parents were released.

A recent survey was conducted by

sending letters to the heads of the departments in charge of adoptions in the various states. Sealed Records, Supra at 113 n.6. The replies indicated that few adoptees are successful in getting their records released. Id. Some states did acknowledge giving non-identifying information such as a medical history. However, the replies indicated that the vast majority do not give the names and places requested. Id.

Open adoption records have been found to be of positive value to the adoptee. Note, The Adult Adoptees Constitutional Right to Know His Origins, 48 So. Cal. L. Rev. 1196, 1203 (1975). In Scotland adoption records have been open to any adoptee who has obtained an age of 17. 20 & 23, Geo. 5c 37 §11 (8). A study based on the Scottish law concluded that

"no person should be cut off from his origins." J. Triseloitis, In Search of Origins: The Experiences of Adopted People (1973). The study stated that open records were beneficial to adoptees even when the information found was originally upsetting. On the basis of the study, Parliment recently enacted a similar law for England and Wales. Klibanoff: Genealogical Information in Adoption: The Adoptee's Quest and the Law, 11 F.L.Q. 185 (1977).

In other jurisdictions constitutional arguments have been raised that the statutes which deny access to the adoptees records may deny due process and equal protection of the law. See. Note: Recognizing the Needs of Adopted Persons: A Proposal to Amend the Illinois Adoption Act. 6 Loy. Chi. L.J. 49 (1975); The

Adult Adoptees, Supra; Note: The Adoptee's Right to Know His Natural Heritage, 19 N.Y.L.F. 137 (1973). The challenges were presented on several theories. The first was that the equal protection clause of the Fourteenth Amendment guarantees the right to be free from unwarranted discrimination. The use of the status of "adoptee" to deny knowledge of the person's natural heritage was therefore in violation of equal protection. Adoptee status like that of race, lineage, or alienage, one author concluded, was a class based on "suspect criteria." Therefore, it became the burden of the state to show that there was a compelling state interest that was served by keeping the records secret. See: The Adoptee's Right, Supra, 137-56. The argument continued that keeping the records sealed did not serve

any valid state purpose and the law was therefore unconstitutional.

The second argument was that the right to know one's heritage is in the prenumbra of rights emanating the Bill of Rights. This must then be weighed against the privacy rights of the natural parents and the right of the state to keep adoptions anonymous. The balance the author of one article concluded should favor the adoptee. Recognizing the Needs of Adopted Persons, Supra, at 56 n 43.

A final argument was that the Illinois Legislature in not setting out the conditions under which the records may be opened made the Adoption Act unconstitutionally vague. The argument is that since the statute failed to give adequate guidelines as to the standards used and persons who need to receive notice, the statute was void for vague-

ness. Id. at 58 n 47.

The Superior Court of New Jersey in Mills v. Atlantic City Department of Vital Statistics, Doc, No. C-3349-75, Chancery Division 1977, decided that the New Jersey sealed records law was constitutional. The right to open one's adoption records, that Court concluded, was not a fundamental right. See p.7. Nor was the class of adoptees suspect. See p.17. The state therefore only needed a rational basis to establish legilation regulating the area. Since the statute did seek to protect the privacy interest of the parents, both natural and adoptive, the statute was valid. Id. at 18.

In Mills the Court went on to weigh the interest of the adoptees who were claiming a psychological need to know against the privacy needs of the parents.

P.21. Since the adoptee had more than a mere curiosity, this Court allowed the records to be unsealed. The Court then formed an order much like that used in Maxtone-Graham, Supra.

After reviewing the Illinois Statute and the case law in other jurisdictions and applying that law to the case at bar, this Court finds:

1. That the petitioner, Daniel Doe, has established a prima facie case for release of these records by showing by a preponderence of the evidence that he, as an adult, has a real and immediate need for such records.

2. That the biological parents have an interest in the case and due process requires that they receive notice of the proceeding and an opportunity to be heard.

3. That the adoptive parents have an interest in this case and due process requires that they receive notice of the proceeding and an opportunity to be heard.

This Court therefore concludes that absent a showing that the adoptive or biological parents will suffer substantial harm, the records shall be released. The burden will be shifted from the petitioner to the adoptive and biological parents to show by a preponderence of the evidence that the harm they will suffer will outweigh any benefit the petitioner might receive.

It is therefore ordered that Melvin Parnell be appointed as investigator and friend of the court to investigate this matter. He shall contact the biological parents and the adoptive parents, give them notice of the pendency of this pro-

ceeding and that the records will be released if the evidence of substantial harm is not presented to this Court. The biological parents and the adoptive parents will be given leave to intervene and show by a preponderence of the evidence that substantial harm will transpire if the relief requested is granted. Absent such a showing, this Court will order the adoption records be opened for petitioner's examination, and the original birth certificate be opened for the petitioner's inspection. Ill. Rev. Stat. Ch.4 §9.1-18, Ch. 111 1/2 § 73-17.

If the investigator is unable to locate the biological parents or the adoptive parents within a reasonable period of time, the petitioner will be required to publish notice of the pendency of this proceeding for 30 days in a pub-

lication of general circulation. If no appearance is made, and no showing of substantial harm is presented, the relief requested will be granted.

Each of the courts and authors cited agree that there may be some therapeutic value in opening adoption records. While some advocate an unfettered right to such information, the majority of authorities have attampted to balance the right of all the parties. This Court concludes that the benefits have to be weighed against the possible detrimental effects. The procedure enunciated in this order allows the Court to balance those rights, and on the basis of the unique facts in each case, arrive at an equitable and just solution.

ENTER:

DATE:

JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 24, 1976

(heard April 12, 1976)

BEFORE

HON. THOMAS E. FAIRCHILD, Chief Circuit Judge

HON. WILLIAM J. BAUER, Circuit Judge

HON. WILLIAM J. CAMPBELL, Senior District Judge*

YESTERDAY'S CHILDREN, a not for profit corporation, et al.,	)
Plaintiffs-Appellants,	)Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-1023	)
v.	)
MARY LEE LEAHY, Acting Director, Illinois Department of Children and Family Services, et al.,	)NO. 75 C 378)Thomas R. McMillen, Judge
Defendants-Appellees.	)

* The Hon. William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

O R D E R

This is a suit brough pursuant to 42 U.S. C. 1983 challenging the Illinois statutory scheme which prevents adults who were adopted as infants from gaining access to their original birth records and court documents. The Plaintiffs-Appellants are adult individuals from all walks of life. All were adopted as children. Each wishes to know the identity of his or her natural parents and relatives. Plaintiffs assert that under Illinois law they are denied a constitutional right of heritage of identity; i.e. the right of access to important personal and private information, the right of freedom of association to maintain a familial relationship with natural parents and relatives, and, the right to be treated equal under the law as all other non-adopted persons.

On appeal Plaintiffs claim that the trial court erroneously refused to convene a three-

judge court pursuant to 28 U.S.C. 2281 *[1] and 2284 and erroneously dismissed the complaint which presented a substantial federal question. We hold that a three judge court was required to hear Plaintiffs constitutional challenge. Consequently, we reverse and remand the case for the convening of a three judge court.

The facts presented are quite simple although the competing interests and constitutional issues appear to be somewhat complex. Under Illinois law any party of an adoption proceeding has the right to move the court to seal the adoption records.*[2] For twenty-five years all adoption records in Cook County have been customarily sealed and during the past two years there has been a general court order to that effect.

*[1] In this footnote the Court cites 28 U.S.C. 2281.

*[2] In this footnote the Court cites Ill. Rev. Stat. Ch. 4, §9.1-18 (1975).

An adoptee can obtain access to his or her adoption records or original birth certificate only by obtaining a court order. The Plaintiffs allege that this information generally is not made available by a court absent a probable and serious medical or hereditary problem. In addition private adoption agencies licensed by the state have interpreted Illinois law as preventing them from giving adoptees access to their records.

The trial court in effect abstained from deciding the issue presented because no state court had ruled on this question of state public policy. However, Plaintiffs-Appellants allege in paragraphs 27 and 28 of their complaint that they and other adoptees have sought unsuccessfully through the Illinois courts view of their files. In the instant case Plaintiffs allege that they have not petitioned the state courts for such records because experience has shown such a petition would be time consuming, expensive, and

fruitless since the courts will not release the information absent a medical reason. In addition, the Plaintiffs met with the various state officials (Defendants herein) and Judge Harry Comerford, the presiding judge of the Cook County Division of the Cuircuit Court, who indicated he was aware of the problem but that he believed adult adoptees should not have access to the records. Judge Comerford has the inherent as well as the discretionary statutory authority to seal the records of adoption.

In light of Plaintiffs-Appellents allegations we believe the tral court erred in abstaining. The two memorandum opinions by the trail judge indicated that he carefully reviewed the problem. We nevertheless reverse because the case involved fragile constitutional rights including First Amendment questions. Zwicker v. Koota, 389 U.S. 241, 88 S.Ct. 391 (1967); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116

(1965) Baggett v. Bullit, 377 U.S. 360, 84 S.Ct. 1316 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963). Recently the Supreme Court in Colorado River Water Conservation District v. United States, 44 L.W. 4372 (decided March 24, 1976) summarized the doctrine of abstention and stated:

> "Abstention from the exercise of federal jurisdiction is the exception, not a rule. '...abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest'...."

The Court set out three instances in which abstention would be proper: First, cases where the federal issue might be mooted or presented in a different picture by a state determination of local law. Second, cases which present difficult questions of state law bearing on policy problems of substantial public import whose importance

transcends the result of the case at bar. And, third, where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings (absent harassment, or a patently invalid state statute).

In this case we believe none of the three abstention situations are present. Obviously, there is no state criminal proceeding so the third type of case noted is inapplicable. The first mentioned case (where a federal question might be mooted by a determination of state law) also does not apply in light of Plaintiff's allegations that they have previously unsuccessfully sought access to their files in the state courts. Nor does the present suit fall squarely within the second category of abstention. The state law and policy in Illinois has been established for years. Adoptees simply are not allowed access to their records unless they come within narrow exceptions. This litigation is a direct challenge to that policy based on alleged constitutional rights.

Thus we do not believe this is a situation where principles of comity and federalism would dictate abstention. The result sought in the instant case is not transcended by the importance of the state policy or the difficulty of the question presented.

Finally we reach the problem of the propriety of convening a three judge court. This Court has jurisdiction to review the action of a district court in failing to convene a three judge court and in dismissing a compleint. Holiday Magic, Inc. v. Warren, 497 F2d 687 (7th Cir. 1974); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Shackman v. Arnebergh, 389 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1967); "Appellate Review of the Decision Whether or Not to Empanel a Three Judge Court," 37 U.Chi.L.Rev. (1969-70).

Although we can review the trial court's procedural decision, the constitutional questions cannot be decided here but must await a decision

by a three judge panel under 28 U.S.C 2281. As Judge Perry aptly stated in Holiday Magic, Supra

> "If the federal claims are substantial, the issues and the merits are for consideration by a three judge panel and this court does not express any opinion as to the ultimate resolution of the issues. Although this court is precluded from reviewing on the merits, it is not 'powerless' to give guidance . . . [citations omitted]. Our function is to review the allegations of the complaint to determine whether a substantial federal constitutional question is presented and whether there is a question fairly open to debate which would entitle Plaintiffs to the three judge relief requested." 497 F2d at 689.

Following our established practice we have considered the allegations made in this case and believe that a substantial federal question is presented. Of course the relief requested by Plaintiffs involves not only the rights of Plaintiffs but also the rights of the unknown parents and relatives.*[3] See: "Recognizing the

*[3] The rights of the unknown parents and relatives

Needs of Adopted Persons: A Proposal to Amend the Illinois Adoption Act", 6 Loyola U. Chi.L. Jour. 49 (1975); "The Adult Adoptee's Right to Know his Natural Heritage", 19 N.Y.L.R. 136 (1973). We express no view whatever with respect to the appropriateness of the relief requested nor do we attempt to evaluate or balance the interest of the parties.

Nevertheless, at this stage of the litigation our only decision is to determine whether Plaintiffs have presented a substantial federal question which meritsa hearing by a three judge court. Since we believe such a question has been presented we reverse the decision of the trial court and remand for the convening of a three judge court.

REVERSED AND REMANDED.

*3 (continued) were well represented on appeal by the "Association for the Protection of the Adoptive Triangle". The Association filed a brief as an amicus curiae. The basic purpose of the not for profit association is to arrange for mutually desired reunions of adopted children and their natural parents and relatives.

Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77 - 1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

SUPPLEMENTAL APPENDIXES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YESTERDAY'S CHILDREN, a not-for-profit Illinois corporation, et al.,	)	
Plaintiffs,	)	
v.	)	NO. 75 C 378
MARY LEE LEAHY, Director, Illinois Department of Children and Family Services, et al.,	)	
Defendants.	)	

DECISION ON MOTION TO DISMISS

As noted in our decision dated June 9, 1975 which declined to convene a three-judge court, all of the defendants have filed motions to dismiss the complaint in this case. The parties have filed additional memoranda in support of the motions, and the plaintiffs' memorandum also contains a motion to reconsider our order of June 9, 1975. It also points out that the present action is no longer a class action, since an amended complaint was filed February 11, 1975.

This eliminates one problem but does not go to the ultimate merits.

After fully considering the memoranda and the motions, we find and conclude that the amended complaint should be dismissed on the grounds of abstention. This of course will not preclude the plaintiffs from filing an action on the merits in the State court, which is the forum where their cause of action should first be decided.

The pending complaint seeks to test the constitutionality of an Illinois statute which does not make it mandatory that adoption files be impounded, but specifically leaves this up to the State court's discretion. 1973 Ill. Rev. Stat., Ch. 4, §9.1-18. Furthermore, the State court judge has entered a general order impounding the records at least until released for good cause, as alleged in §24 of the complaint. As has often been decided, a State court has the inherent power to impound its records, subject to inspection by proper persons. Husband C v.

Wife C, et al., 320 Atlantic 2d 717, 723-4 (Del. Supr. 1974). Therefore, even if we were to decide that the Illinois statute deprives the plaintiffs of their constitutional rights, we would still be confronted with the general order issued by the Circuit Court of Cook County under its inherent power. Plaintiffs do not specifically seek relief against that order, and of course their primary relief lies in an appeal therefrom.

The principal reason why we believe abstention is the proper course to follow in this case, however, is that the complaint involves a basic question of State public policy which has not been passed upon by the State courts, i.e., whether the plaintiffs should generally be deprived of access to the record of their personal origins. It is not the function of this court to decide public policy for the State of Illinois or for its judiciary, and we will not assume that the State courts will decide such issues contrary

to the Constitution of the United States. Therefore the plaintiffs and the organization representing them should apply to the State courts for relief and let those courts decide whether the statute and the general order deprives them of any rights under the Illinois or Federal constitutions.

The plaintiffs have not filed such an action and allege that it would be futile. This is more of an assumption then we can make under the circumstances. Plaintiffs admit that some records concerning adopted children are released for proper cause shown. One of the issues which should be decided by the State courts, presumably, is what are the confines of proper cause, as well as whether general impoundment is per se unconstitutional.

The plaintiffs are well aware of the doctrine of abstention but rely upon such cases as Zwickler v. Koota, 389 U.S. 241 (1967) where actual prosecution had been completed and fragile First

Amendment rights were involved; see also Younger v. Harris, 401 U.S. 37 (1971). The Supreme Court of the United States has recently emphasized the desirability of abstention when a State's policy is unsettled, however, as in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Although we realize that the case at bar is one step removed from the foregoing decisions in that no State court action is pending or even contemplated by the plaintiffs, we believe the principle of comity requires the same result. See Reetz v. Bozanich, 397 U.S. 82 (1970); Koehler v. Ogilvie, 53 F.R.D. 98, 104 (3-Judge Court, N.D. Ill. 1971), affirmed 405 U.S. 906 (1971).

An alternative to dismissal would be to retain jurisdiction until the State courts have acted. However, this may never happen if the plaintiffs do not file a State court action. Rather than retaining jurisdiction over this case for an indefinite period of time, therefore, and rather than acting on the motions to dismiss on

their merits or through a three-judge court, the fairest disposition to all concerned is to dismiss the amended complaint on the grounds of comity, leaving the plaintiffs free to take whatever course of action they see fit.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of the defendants to dismiss are granted, without prejudice to the merits.

ENTER:

THOMAS R. McMILLEN
JUDGE, U.S. DISTRICT COURT

DATED: Oct. 24, 1975

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YESTERDAY'S CHILDREN CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, and JAMES DOE,	)	
Plaintiffs,	)	
v.	)	
MARGARET KENNEDY, Director, Ill. Dept. of Children & Family Services, HARRY COMERFORD, Presiding Judge, County Div., Circuit Court of Cook County, PAUL Q. PETERSON, Director, Ill. Dept. of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,	)	NO. 75 C 378
Defendants.	)	

D E C I S I O N

This case comes on to be heard by a three-judge court in compliance with an unpublished order entered by the United States Court of Appeals for the Seventh Circuit on May 24, 1976. That order reversed a decision of the trial court which

had declined to convene a three-judge court and had dismissed the complaint for lack of a substantial Federal question.

Subsequent to the Court of Appeals' order, plaintiffs filed a motion for summary judgment to declare unconstitutional certain specified sections of the Illinois Revised Statutes, and defendants re-briefed their original motions to dismiss the Amended Complaint. We now allow the Amended Complaint to be filed and have further amended it to name the newly-appointed State officials. Also, an organization known as The Association for the Protection of the Adoptive Triangle was allowed to intervene and to oppose generalized opening of adoption records. It has joined in the defendants' motions to dismiss.

We have decided that the defendants' motions should be granted on the ground of abstention, that plaintiffs' motion for summary judgment should therefore be denied and that their complaint for a declaratory judgment and injunction should

be dismissed without prejudice. Since there are no other material issues remaining in this case, we also deny plaintiffs' motion for oral argument.

Plaintiffs allege that they are members of an organization known as Yesterday's Children, an Illinois corporation not-for-profit, and were adopted as infants from unknown parents. They allege that they have been unable to obtain vital information on their family origins due to certain Illinois statutes to be set forth hereinafter. Plaintiffs also seek to contest a General Order entered by the presiding judge of the County Division of the Circuit Court of Cook County on February 21, 1974 that " . . . all adoption files in the offices of the Clerk of the Circuit Court shall be impounded and shall be released only upon an order issued from the County Division of the Circuit Court".

Plaintiffs allege that they have attempted to obtain their original birth certificates or otherwise learn their true parentage from various

private adoption agencies and from the Illinois Department of Children and Family Services but have been unsuccessful because these organizations have honored the foregoing Statutes and the General Order of the Circuit Court of Cook County. Plaintiffs have not attempted to obtain a release of their records by order of the Circuit Court, alleging that this would be expensive, time consuming, and futile, "absent medical exigencies" (which are not alleged to exist). None of the adoption agencies are parties defendant, nor is it alleged that they have the information sought by the plaintiffs. Plaintiffs claim that to deprive them of information concerning their "natural heritage" violates their constitutional rights under the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States.

Chapter 4, §9.1-18 of the Ill. Rev. Stat. (1975) effective January 1, 1960 provides in pertinent part as follows:

Records confidential

* * * * * * * * * * *

Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may, order that the file relation to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order.

Chapter 111 1/2 §73-17 of the Ill. Rev. Stat. (1975) effective August 31, 1971 provides in pertinent part as follows:

* * * * * * * * * * *

(2) When a new certificate of birth is established, the actual place and date of birth shall be shown; provided, in the case of adoption of a person born in this State by parents who were residents of this State at the time of the birth of the adopted person, the place of birth may be shown as the place of residence of the adoptive parents at the time of such person's birth, if specifically

requested by them, and any new certificate of birth established prior to the effective date of this amendatory Act may be corrected accordingly if so requested by the adoptive parents or the adopted person when of legal age. The new certificate shall be substitute for the original certificate of birth:

(a) Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation.

* * * * * * * * * * *

(4) When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

* * * * * * * * * * *

As was pointed out when the original complaint was dismissed, these statutes reflect a basic

policy of domestic relations, a matter of particular concern to the State of Illinois. We are not aware of any decision by the Illinois appellate court in which the application of the statutes has been involved. Nor have the parties found any Illinois reviewing court which has expressed its views in this obviously sensitive area. Plaintiffs have not even asked the Circuit Court of Cook County to review their problem. We are not satisfied that plaintiffs have raised a genuine Constitutional issue, but if they have, there is no reason to believe that the Illinois courts would deprive them of any Constitutional rights which they may have.

Of course the State statute must be potentially consistent with a constitutional interpretation before abstention is proper. Kusper et al., v. Pontikes, 414 U.S. 51 (1973). The defendants and Intervenor suggest that the statutes can be construed so as to allow the Illinois courts to balance the interests of all parties. We agree

with this approach and conclude that the State courts can thus apply the statutes in such a way as to withstand constitutional attack. In any event, authoritative construction by the State courts will define with precision the constitutional questions raised. It remains to be seen whether or not the General Order issued by the Circuit Court of Cook County on February 21, 1974 as applied to specific petitions for release of the records, would survive.

The Supreme Court has not addressed the issue of a right to know one's natural parentage. No absolute right to this information is readily apparent under the Bill of Rights, whereas the Intervenor's interest in suppressing this information is in some respects analogous to the familial privacy protected in Griswold v. Connecticut, 381 U.S. 479 (1965). Nor do we perceive that the status of being adopted places one in a "suspect" classification so as to require a strick scrutiny of the Illinois statutes. See Mathews v. Lucas,

427 U.S. 495, 515016 (1976). Finally, we are not aware of a "fundamental right" to obtain information concerning one's natural parents, either under the First or Ninth Amendments to the Constitution.

The impoundment order entered by the presiding judge of the County Division of the Circuit Court of Cook County is effective in only one of the State's 102 counties. Since the County Division of the Circuit Court of Cook County presumably has the inherent right to suppress any files under its jurisdiction, subject to release upon good cause shown, the order itself does not necessarily reflect statewide policy. Consequently, it may not be a proper subject for review by a three-judge court, absent the Illinois statutes. See Harris County Commissioner's Court v. Moore, 420 U.S. 77, 88 (1975); 28 U.S.C. §2281. In view of our decision to abstain, we leave any review of the court order to the State courts.

In the recent case of Ohio Bureau of Em-

ployment Services et al. v. Hodory, ___U.S.___, 45 U.S.L.W. 4544 at 4546 (May 31, 1977), the Supreme Court noted that there are two primary types of Federal abstention:

> The first, usually referred to as Pullman abstention, involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. Railroad Commission v. Pullman Co., 312 U.S. 493 (1941). See Bellotti v. Baird, 428 U.S. 132 (1976). The second type is Younger abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on-going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. Younger v. Harris, 401 U.S. 37 (1971).

A leading case on which we rely for abstention is Bellotti, Attorney General of Massachusetts, et al. v. Baird et al., 428 U.S. 132 (1976). The Supreme Court there required a three-judge court to abstain from ruling on the validity of a State statute until the Supreme

Judicial Court of Massachusetts had done so. The statute required parental consent for abortions on minors but also provided that consent could be obtained by court order "for good cause shown" if one or both parents refused to consent. The Supreme Court ruled that the State statute could be construed constitutionally to permit a "mature minor" to obtain a court order without parental consent. Until it became clear that the State courts would prevent this by effectively eliminating the "good cause" provision, thereby achieving unqualified parental veto, the Supreme Court held that Federal constitutional rights were not necessarily violated and that the three-judge court had prematurely declared the statute unconstitutional. It order the matter certified to the Massachusetts Supreme Judicial Court (although this procedure is not available in Illinois).

In Juidice et al. v. Vail et al., ___U.S. ___ 97 S.Ct. 1211 (March 22, 1977), the Supreme Court required abstention when plaintiffs had

failed to exercise their State court remedy. A New York statute permits contempt and imprisonment of judgment debtors who ignore subpoenas in supplemental proceedings. Even on this sensitive Fourteenth Amendment issue of deprivation of personal liberty, the Court reversed a declaratory judgment of the three-judge court for the Southern District of New York which had struck down the New York statute, stating at ___U.S.___, 97 S.Ct. 1218:

> Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceeding [f.n. omitted]. No more is required to invoke Younger abstention . . . Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, Gibson v. Berryhill, 411 U.S. 564, 577 (1973) . . . and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate [f.n. omitted]. Presumptively, therefore, the principles which underlie Younger call for dismissal of the action. [emphasis in original].

In the case at bar, plaintiffs admittedly

have failed to contest a State court order which allegedly has been in effect since 1961 in one form or another, asserting that this would be "futile". However, Ch. 4, §9.1-18 provides that the impounded records may be opened "upon specific order of the court", and Ch. 111 1/2, §73-17 (2) (a) also allows inspection of original birth records upon court order. The same section apparently authorizes the State defendants to permit inspection of the original records "by regulation". Therefore, the statutes in our opinion are not "flagrantly and patently violative of express constitutional prohibitions." Huffman v. Pursue, Ltd., 420 U.S. 592, 612 (1975) quoting from Younger v. Harris, 401 U.S. 37 (1971). Plaintiffs should ascertain what the Illinois statutes actually require before they seek to vindicate any alleged Federal constitutional rights in this court. cf. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 72-5 (1976).

Since there is a State proceeding in which

the matters before us can and should be litigated, we believe that abstention in this case apparently falls under both of the doctrines identified in the Ohio Bureau decision (supra p.7). Plaintiffs contend, however, that the Court of Appeals' unpublished Order of May 24, 1976, decided the issue of abstention. The Court therein said that abstention was improper in this case. This conclusion was dictum, however, in light of the fact that the Court was merely reviewing the need to convene a three-judge court in this case. In deciding that a three-judge court was required, the Court of Appeals exhausted its jurisdiction. Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966). Notwithstanding the nature of the observations on abstention in the May 24 order, we have carefully considered the Court's analysis and note that it did not have the benefit of the subsequent Supreme Court decisions referred to above. See also Trainor v. Hernandez, ___U.S.___, 45 U.S.L.W. 4535 (1977);

and Wooley v. Maynard, ___U.S.___, 97 S.Ct. 1428 (1977).

Furthermore, we believe that abstention is proper for at least two of the reasons specified in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), cited in the unpublished order of the Seventh Circuit. First, the federal issue might very well be presented in a different posture by a definitive state court construction of the statutes. Secondly, this case presents difficult questions of state law bearing on policy problems of state-wide public import.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiffs' motion for summary judgment is denied, their prayer for a preliminary and permanent injunction is denied, and defendants' motion to dismiss is granted, all on grounds of abstention. The Amended Complaint is dismissed

without prejudice.

ENTER:

WILBUR F. PELL, JR.
Circuit Judge

THOMAS R. McMILLEN
District Judge

ALFRED Y. KIRKLAND
District Judge

DATED: Aug. 8, 1977

Supreme Court, U. S.
FILED
MAY 31 1978
MICHAEL RODAK, JR., CLERK

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vs.

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Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals For
The Seventh Circuit

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Younger v. *Harris*, 401 U.S. 37 (1971); 5, 6

Zwickler v. *Koota*, 389 U.S. 241 (1967). 11

STATE:

In the Matter of Daniel Doe, No. 76 Co 2436 (Cir. Ct. of Ck. Cty., Nov. 22, 1977). 5, 13

STATUTES:

Illinois Revised Statutes, ch. 4, §9.1-18 (1975); 11

Illinois Revised Statutes, ch. 111-½, §13-17 (1975); the Illinois Vital Records Act. 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

vs.

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals For
The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of the Opinion is attached as Appendix 1 to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did a Three-Judge District Court properly apply the abstention doctrine to preclude it from construing state statutes which are not patently unconstitutional, the provisions of which have never been definitively interpreted by the state courts, and no harmful consequences would arise from the delay necessary to secure an authoritative state court reading of the statutes?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioners' recitation of the statement of the case is substantially correct. Essentially, they seek to hold the Illinois Adoption records system unconstitutional as violative of their rights under the First, Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the Federal Constitution. The state statutory system impounds court files and adoption records, subject to disclosure on petition to an Illinois court. Petitioners did not state that they failed to allege any facts showing that any harmful consequences would ensue if federal abstention was required. In addition, a lawsuit was filed in 1978, in the Circuit Court of Cook County, *In the Matter of Barbara Lois Lebowitz Marks, et al.*, No. 78 Co 307, challenging the Illinois Adop-

tion Records system and raising substantially the same constitutional issues as Petitioners asserted in the federal courts below. (A copy of the petition and Memorandum of Law in Support of Petition for Review of Sealed Adoption Records filed *In the Matter of Barbara Lois Lebowitz Marks, et al.*, are attached as Respondents' Appendixes 1 and 2, respectively.)

ARGUMENT

I.

THE DOCTRINE OF ABSTENTION WAS PROPERLY APPLIED.

In essence, petitioners assert that the federal district court should have reached the merits of their claims even though there is no authoritative Illinois decision interpreting a delicately—balanced statutory scheme or addressing the important constitutional issues raised in the federal court complaint.

Petitioners' argument goes too far. Its very statement reveals that abstention was the only feasible course available below. In the last four decades, this Court has developed a venerable line of cases compelling the conclusions reached by both the Three—Judge District Court panel and the Seventh Circuit Court of Appeals. In view of the correct application of the well—settled rules of law by the courts below, Respondents submit that no issue worthy of *certiorari* is presented herein.

In *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), the Court explained there are two types of federal abstention:

> The first, usually referred to as *Pullman* abstention involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 493 (1941). See *Bellotti* v. *Baird*, 428 U.S. 132 (1976). The second

> type is *Younger* abstention, in which the court is primarily concerned, in an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an on—going state proceeding, and as they involved the ability of the state courts to consider federal constitutional claims in that context. *Younger* v. *Harris*, 401 U.S. 37 (1971).

Id., at 477.

The principles of both *Younger* and *Pullman* abstention are applicable in the instant case.

1. Principles of Equity, Comity and Federalism Require Abstention—Younger Abstention.

Considerations of equity, comity and federalism form the heart of the abstention doctrine in either of its facets. These considerations mandate abstention in the instant case, especially because there is a pending state court action seeking resolution of substantially the same issues raised by Petitioners below.[1]

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[1] On March 27, 1978, *In the Matter of Barbara Lois Lebowitz Marks, et al.*, No. 78 Co 307, was filed in the Circuit Court of Cook County. This petition asks for a clarification of the standards needed to unseal Illinois adoption records, as articulated *In the Matter of Daniel Doe*, No. 76 Co 2436 (Cir. Ct. of Ck. Cty., Nov. 22, 1977), an unreported, unappealed Illinois trial court decision. Further, the *Marks* petition challenges the statutory scheme on federal constitutional grounds. (A copy of the *Marks* petition and Memorandum of Law in its support are attached as Respondents' Appendixes 1 and 2.) The same attorney who represents Petitioners herein is also a counsel of record in *Marks*.

Younger v. *Harris*, 401 U.S. 37 (1971) held that a federal court should not enjoin an on-going state criminal proceeding unless extraordinary circumstances where the danger of irreparable loss is "both great and immediate." *Id.*, at 46, quoting, *Fenner* v. *Boykin*, 271 U.S. 240, 243 (1926).

> . . . the notion of "comity," that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. *** the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, supra, at 44.

This principle was extended to restrain federal courts from interfering with certain pending civil proceedings. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). After an adverse judgment in a state civil nuisance action, the defendant elected to forego state appellate review, and sought, instead, federal injunctive and declaratory relief. He alleged the statute was unconstitutional. The Court held abstention warranted, stating:

> A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter

> of right [citing statute]. Thus, appellee in this case was assured of eventual consideration of its claim by this Court. But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which, as we have already explained, is quite costly in terms of the interests which *Younger* seeks to protect.

Id., at 605-606.

In the course of the Court's opinion in *Huffman*, it was noted that:

> [t]he seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief (injunctive and declaratory), they should abide by standards of restraint that go well beyond those of private equity jurisprudence.

Id., at 603. *Massachusetts State Grange* v. *Benton*, 272 U.S. 525 (1926), was cited as illustrative of this concern. That case involved a federal action to enjoin the operation of the Massachusetts daylight savings act—a civil law.

The *Benton* Court affirmed the dismissal of the action by a three-judge District Court panel because:

> . . . . no injunction ought to issue against officers of State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.*** *Fenner* v. *Boykin*, 271 U.S. 240. . . .

Id., at 527-528.

The facts of *Benton* are analogous to the instant case. Both requested a declaration that the challenged state laws were unconstitutional. Both requested an injunction barring state officials from enforcing the law. The only significant difference was that there was no ongoing state proceeding in *Benton,* yet federal court abstention was mandated in that case.

Therefore, the important rule of *Fenner* v. *Boykin, supra,* (barring federal intervention in on-going state criminal proceedings) which laid the conceptual foundation for *Younger, Huffman* and a host of other decisions, was applied in a civil setting almost fifty years ago. It is significant that the same Court which promulgated the *Fenner* rule also handed down the decision in *Benton.*

Abstention is, therefore, appropriate to bar federal declaratory and, particularly, injunctive relief against state officials duty bound to enforce important state civil laws, unless there is a showing great and irreparable injury would arise.

Petitioners in the instant case did not allege below nor in their Petition to this Court that any harm would result if federal court adjudication of their claims was withheld. However, Petitioners' request for declaratory and injunctive relief would substantially interfere with the enforcement of a sensitive, vitally important state statutory scheme. Furthermore, this is not a case, as will be demonstrated, *infra,* where the proper resolution of the important state and constitutional issues is "reasonably free from doubt."

More recently, principles of federalism and comity were applied to a case involving a state's contempt proceedings. In *Juidice* v. *Vail,* 430 U.S. 327 (1977), a judgment debtor, after ignoring subpoenas to appear in supplemental proceedings, was held in contempt of court and imprisoned. The debtor sought federal declaratory relief attacking the constitutionality of the contempt process. The Court held abstention was proper, holding:

> Here it is abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceeding. No more is required to invoke *Younger* abstention. [Emphasis in original, footnote omitted.]

Id., at 337.

Trainor v. *Hernandez,* 431 U.S. 434 (1977), held a district court was restrained from granting declaratory and injunctive relief in an action challenging the constitutionality of the Illinois Attachment Act. A Writ of Attachment had been issued against the parties and proceedings had been commenced in the Illinois Circuit Court. This Court declared:

> For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts.

Id., at 445.

In the instant case, the important principles of equity, comity, and federalism will be fostered by abstention.

The opportunity to litigate the constitutional claims of importance to both Petitioners and Respondents herein are certain of state court attention and resolution. The pending state court lawsuit raises substantially the same federal constitutional issues as Petitioners raised below.

Abstention will insure that duplicative federal and state court decisions will not arise and, thus, needless antagonism in state and federal relations will be avoided.

More importantly, state and local officials will not be precipitously enjoined from administering the Illinois adoption records system, which is of vital importance to the state. There is no risk of immediate, irreparable harm to the Petitioners if federal review is withheld pending a determinative state court interpretation of the challenged statutory scheme.

Finally, abstention here will serve the salutory goal of granting the state courts the first opportunity to construe the contested statutes. The Illinois appellate process may be employed to narrow and to clearly define the constitutional issues. If they survive and are determined adversely to the Petitioners' interests, then, but only then, will federal court review by warranted.

2. Necessity for State Court Interpretation of Undefined Statutory Terms—Pullman Abstention.

Railroad Commission of Texas v. *Pullman Co.*, 312 U.S. 496 (1941), established an equitable principle requiring a federal district court to withhold constitutional scrutiny of a state statute, fairly open to interpretation, until the state courts have made a definitive analysis of the enactment.

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by,

> the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

Harman v. *Forssenius,* 380 U.S. 528, 534 (1965). However, these goals must be considered in light of "the delay and expense to which application of the abstention doctrine inevitably gives rise. *Lake Carriers' Assn.* v *MacMullen,* 406 U.S. 498, 509 (1972), quoting, *England* v. *Medical Examiners,* 375 U.S. 411, 418 (1964).

a. Constitutional Reconciliation

Petitioners contended below that the Illinois statutory scheme, outlined in Illinois Revised Statutes ch. 4, § 9.1-18 and ch. 111-½, §13-17 (1975), unconstitutionally deprives them of an unfettered right of access to their birth and adoption records. More specifically, these statutes provide that adoption records may be impounded by court order and unsealed only upon specific court order. A General Order, effective only in Cook County (one of 102 Counties in Illinois), has impounded all adoption records since 1974. (Petitioners' Appendix 55, at E3.)

A federal court cannot abstain from decision if the statute is so patently unconstitutional that no interpretation by a state court could bring it in harmony with the Constitution. *Zwickler* v. *Koota,* 389 U.S. 241, 251-252 (1967). Therefore, abstention is proper if the district court finds the statute can be constitutionally construed or construed to avoid or materially alter the federal constitutional question. *Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976), *Carey* v. *Sugar,* 425 U.S. 73, 78-79 (1976), *Kusper* v. *Pon-*

tikes, 414 U.S. 51, 54-55 (1973), *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959).

The Three-Judge District Court panel in this case, after consideration of all arguments, concluded:

> The defendants and Intervenor suggest that the statutes can be construed so as to allow the Illinois courts to balance the interests of all parties. We agree with this approach and conclude that the State courts can thus apply the statutes in such a way as to withstand constitutional attack.

(Petitioners' Appendix 55, at E7-E8.)

Furthermore, Petitioners' constitutional claims raise questions of first impression. Without the benefit of a single decision directly on point, they proclaim the existence of a fundamental right to know and to obtain information about one's natural parentage. They argue that "adoptees" make up a "suspect" classification, requiring strict scrutiny of the challenged Illinois provisions. The Three-Judge District Court panel below observed there is no firm precedent to support any of these claims (Petitioners' Appendix 5, at E8-E9).

Therefore, it would be difficult, if not impossible, for a court to hold the Illinois statutory scheme patently impinges on any cognizable, constitutionally protected rights. (No further consideration of the constitutional claims is warranted in these proceedings.)

If it can be fairly concluded that the statute can be constitutionally construed, as it was in the instant case, then the threshold requirement for abstention is met. *See, Bellotti* v. *Baird, supra,* at 148, *Kusper* v. *Pontikes, supra,* at 55. The doctrine does not forbid a court to engage in a lengthy constitutional reconciliation of the

statute, but it does not mandate it. All that is needed is a finding that constitutionally reasonable interpretation is possible. Peititoners' assertion that no attempts to determine the constitutionality of the Illinois statutes is meritless.

This case does not involve a statute treading on clearly recognized fundamental federal rights, such as the right to vote, *Harman* v. *Forssenius, supra,* or First Amendment Freedoms, *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), *Zwickler* v. *Koota, supra,* where no state court interpretation could save the enactment from constitutional violation.

However, this case *does* involve important but, as yet clearly undefined, questions of state law, which should be decided in the first instance by the state courts.

b. Unsettled Questions Of State Law.

Abstention is mandated to permit the Illinois statutory scheme to

> . . . be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.

Harrison v. *N.A.A.C.P., supra,* at 178.

When this action was originally filed, petitioners conceded no interpretation of the contested statutory scheme had been made by any court—state or federal. In the midst of appellate review of the procedural issues in this case, an Illinois trial court handed down an unreported decision, *In the Matter of Daniel Doe* (Petitioners' Appendix 2) limited, however, to state law questions.

The federal constitutional claims pressed by Petitioners below in federal court were not raised in the state action, although the same attorney represented plaintiffs in both the federal and state proceedings. The final decision in *Doe* was never appealed, thus efficiently barring any authoritative, definitive state review of even the complex state law questions.

As summarized by the Seventh Circuit Court of Appeals, the state court, interpreting the Illinois laws, established a standard for opening adoption records. If an adoptee can

> .... show by a preponderance of the evidence that, as an adult, he or she has a *real and immediate* need for such records, and if such a showing is made, the biological and adoptive parents in order to avoid unsealing must show by a preponderance of the evidence that *substantial harm* will transpire if the relief requested is granted. [Emphasis added.]

(Petitioners' Appendix 1, at A7.)

The Seventh Circuit analyzed the *Doe* standards explaining that while a "good cause" element was read into the statutes and General Order, this failed to remove the inherent ambiguities. "Good cause" was viewed as a substitute for several other broad terms which were undefined. Two key phrases in the *Doe* standard, "real and immediate need" and "substantial harm," were not clearly defined. The Court of Appeals also noted that defendants (Respondents herein) suggested at oral argument that adulthood alone could constitute good cause and that an order or statutory provision could so provide. (Petitioners' Appendix 1, at A7 n. 8.) This example was obviously given to point up the range of potential interpretations an Illinois court might well read into the *Doe* decision and its underlying enactments.[2]

It is also important that the General Order reviewed in *Doe* is only the order of one court of one county in Illinois construing the limits of the challenged Illinois statutes. An interpretation of that Order, therefore, does not require the conclusion that it is the final word on the construction of the statutes or that it reflects the policy of the state of Illinois.

Where state law questions are uncertain and clearly capable of a limiting interpretation, federal court abstention has been ordered by this Court. *See, Bellotti* v. *Baird, supra,* at 146-147, *Carey* v. *Sugar, supra* at 77-78, *Zwickler* v. *Koota, supra,* at 251, n. 14, *Harman* v. *Forssenius, supra,* at 534 and *Harrison* v. *N.A.A.C.P., supra,* at 534.

Abstention is especially appropriate where "good cause" or "just cause" standards are at issues as in the instant case, because they are open to a variety of interpretations. *Bellotti* v. *Baird, supra,* at 146, *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 44 (1970).

Here the statutes and General Order are open to and, in fact, demand further interpretation.

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[2] The ambiguous standards set forth in *Doe* have already generated some confusion. In the Memorandum of Law supporting the complaint *In the Matter of Barbara Lois Lebowitz Marks, et al.* (Respondents' Appendix 2), the plaintiffs stated that the standards for releasing adoption records remained unclear. They seek a clarification of the terms "real and immediate need" and "substantial harm." (Respondents' Appendix 2, at 3-4). The *Marks* action underscores the dire need for a definitive state court interpretation of the Illinois statutes. It eloquently affirms the correctness of federal court abstention.

> The paradigm case for abstention arises when the challenged state statute is susceptible of 'a construction by the state courts that would avoid or modify the [Federal] constitutional question. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152. Compare *Baggett* v. *Bullitt*, 377 U.S. 360, [12 L.Ed.2d 377, 89 S.Ct. 1316.]' *Zwickler* v. *Koota, supra,* at 249 . .

Lake Carriers' Assn. v. *MacMullen, supra,* at 510-511. The instant case falls effortlessly into this class of cases warranting abstention. Any federal court decision now could be displaced and, thus, unnecessary if an Illinois reviewing court issued a conclusive decision on the challenged statutory scheme. This result would be at odds with the abstention doctrine. *Railroad Commission* v. *Pullman, supra.*

Furthermore, without a thorough, comprehensive analysis by a state reviewing court defining the "good cause" requirements of *Doe* there is no way to pinpoint the precise federal question presented by the instant case, as the Court of Appeals correctly stated. (Petitioners' Appendix 1, at A9.) Yet, the federal constitutional question must be clearly defined to make federal adjudication proper. Otherwise, a federal court would improperly pass on "constitutional contentions presented in an abstract rather than a concrete form." *Government & Civic Emp. Org. Comm.* v. *Windsor*, 353 U.S. 364, 366 (1957).

For more than two hundred years, federal courts have refused to render advisory opinions on a set of hypothetical facts. It is a principle so well recognized it needs no authority. But, this is exactly what Petitioners have requested in the instant case.

As additional, compelling support for abstention, the Seventh Circuit reasoned that even if *Doe* resolved all the ambiguities in the statutory scheme, still it is not a final, authoritative interpretation—this must come from a higher reviewing court. It quoted *Connecticut State Federation of Teachers* v. *Board of Education,* 538 F.2d 471, 485 (2d Cir. 1976) for the conclusion that:

> decisions by state trial judges, particularly unreported decisions, generally provide insufficient clarity to make abstention inappropriate at least in the absence of a similar decision by the state's appellate courts. [footnote omitted].

(Petitioners' Appendix 1, at A9.)

In *Government & Civic Employees Union* v. *Windsor, supra,* this Court sanctioned abstention in a factual setting analogous to the instant case. In a federal court action, a union challenged the constitutionality of an Alabama law limiting benefits to public employees who joined unions. The federal court abstained to permit the union to obtain an authoritative state court interpretation. However, state review was limited to the coverage of the act and no constitutional issues were raised. After Alabama trial and Supreme Court decisions holding the act applied to the union, the union returned to federal court. Abstention was invoked again, because the state failed to construe the law unconstitutionally and there was no indication it would do so in a later review.

This Court affirmed the District Court decision because

> . . . bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute

> in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner.

Id., at 366.

Similarly, the *Doe* decision, while not even appealed to an intermediate Illinois court, never decided the constitutional issues raised by Petitioner in the federal proceeding. (*See,* Petitioners' Appendix 2, at B12-B20.) *Windsor* instructs that to foreclose abstention, a state court interpretation is required of all the unsettled issues—both local and federal—not merely those a complaining party may wish to litigate.

Petitioners have asserted constitutional rights which have never been judicially recognized. They would have a federal court not only grapple with complex state law questions and policies, best left to the state, but define and recognize new, fundamental constitutional rights. The decision would be a landmark. But a federal court is not the forum in which such important and intertwined questions of federal and state law should be first reviewed. Only a well-briefed and argued case, subject to thoughtful analysis at the various levels of a state's reviewing courts will produce a decision with narrowly, well-defined constitutional questions, should they even exist in the instant case. Illinois courts have a duty to protect the Petitioners' federal constitutional rights and are presumed capable of interpreting the statutes to that end. This is the kind of authoritative, definitive state court interpretation that will grant a federal court authority to reach the constitutional issues in a state statute.

The *Doe* decision does not and never could supply the necessary state court interpretation to block abstention in the instant case.

c. Important State Policies Requiring Abstention.

The federal court below properly abstained to avoid premature constitutional decision of a state statutory scheme touching on one of the most sensitive areas of state concern—the family. It is an area governed almost exclusively by the state. As advised in *Railroad Commission* v. *Pullman, supra,* at 498, abstention is imperative when a complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." As is clear, there are other alternatives to federal decision in the instant case.

In the recent decision of *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 824 (1976), this Court held abstention proper "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar." The Seventh Circuit found this citation characterized the issues in the instant case. (Petitioners' Appendix 1, at A10.)

The Illinois statutory scheme attempts to balance the complex, emotion-ridden relations among children, their natural and adoptive parents. Federal courts have only reluctantly entered controversies concerning family law and probate, *Ex Parte Burrus,* 136 U.S. 586 (1890), imimplicitly recognizing the need for local resolution of these matters.

It is obvious that the difficult and vitally important questions of state law surrounding the Illinois adoption

records system transcend the case at bar. A federal court has been asked to decide issues that will not only affect these seven Petitioners, but could dramatically alter the lives of thousands of men, women and children in the state of Illinois, perhaps even across the nation. The virtual certainty of such an awesome result should shift the balance in favor of a thorough state court determination. Thus, federal abstention was and remains the only course.

d. No Harm Would Arise from the Delay Caused by Abstention.

In *Lake Carrier's Assn.* v. *MacMullen, supra,* at 509, this Court cautioned that a decision to abstain should include consideration of "the delay and expense to which application of the abstention doctrine inevitably gives rise." *Accord, Bellotti* v. *Baird, supra,* at 150; *Harman* v. *Forssenius, supra,* at 537.

The Seventh Circuit, in its opinion affirming abstention, held that no "substantial personal consequences" would arise to Petitioners from a delay of federal review, (Petitioners' Appendix 1, at A10.) It also noted that Petitioners had failed to argue any harm would arise from delay. (Petitioners' Appendix 1, at A10, n. 13.) In their Petition to this Court, they again failed to allege any harm would result from a state court review.

The constitutional and state questions are now before an Illinois trial court, *In the Matter of Barbara Lois Lebowitz Marks*, No. 78 Co 307, (Cir. Ct. of Ck. Cty.) (Respondents' Appendix 1) The Illinois appellate process is available to review the contested statutory scheme and to produce a definitive interpretation of the state and constitutional questions.

Therefore, the absence of any showing of a need for an expeditious federal court hearing, coupled with the availability of a state forum for the presentation of the constitutional claims, abstention was proper.

CONCLUSION

The federal district court properly abstained from consideration of the unclear state and uncertain constitutional issues presented in the instant case. Thus, the important principles of equity, comity, and federalism, at the heart of the abstention doctrine, were fostered. This decision was correctly affirmed by the Court of Appeals for the Seventh Circuit.

Wherefore, Respondents pray that the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

PETITION FOR REVIEW OF SEALED PERSONAL BIRTH RECORDS

1. The Petitioners, adult adoptees who were adopted through the Circuit Court of Cook County, Illinois are presently adults, who for a variety of reasons wish to obtain their court and birth records so that they may attempt to discover their birth parents.

2. Barbara Lois Lebowitz Marks was born on August 6, 1944 and believes that the decree for her adoption was entered on August 17, 1944 in Chicago, Illinois.

3. Her adoptive parents were Morris and Mary Lebowitz of Minneapolis, Minnesota. Her adoptive father died in 1963. Her adoptive mother's name is Mary Lebowitz Levy and she currently lives in Minneapolis, Minnesota and has no objections to her adopted daughter's efforts to gain access to her birth records. (See attached Affidavit)

4. Petitioner Marks is the mother of a child—presently eight years old who is mentally retarded and epileptic—and therefore believes that it is essential to learn as much as possible about her genetic history.

5. Doris A. Haag was born on March 1, 1930 and adopted on or about June 1930 through the Beulah Home and Maternity Hospital. She has maintained a desire to obtain her birth records to attempt to learn of her identity and her parents names and identity.

6. Roger Barth was born on July 14, 1949 and adopted by private adoption during 1950.

7. Bonnie Olson was born on October 29, 1939 and adopted on or about February 2, 1940 through the Cradle Adoption Agency.

PRAYER

The Petitioners respectfully ask that this Court order that their court and birth records be immediately open to each of them so that they may begin to attempt to determine who their natural birth parents are.

Respectfully submitted,
/s/ Patrick T. Murphy
Patrick T. Murphy
Sharon Covelman

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Chicago, Illinois 60602
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STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

BARBARA LEBOWITZ MARKS, being first duly sworn on oath, deposes and says:

1. That her true and correct name and address are as follows:

Barbara Lois Lebowitz Marks
5704 Winnetka Avenue North
New Hope, Minnesota 55428

Further, that to the best of her knowledge, she was born on August 6, 1944, in Chicago, Illinois.

2. That she has no information as to the exact place or circumstances of her birth.

3. That a decree of adoption was entered on August 17, 1944, in Chicago, Illinois; that the attorneys involved in the adoption are believed to have been Samuel Finkelstein, of Minneapolis, Minnesota, and the late B. Hamilton Edison, of Chicago, Illinois.

4. That affiant's adoptive parents were Morris and Mary Lebowitz, of Minneapolis, Minnesota; that her adoptive father, Morris Lebowitz, died in 1963; that her adoptive mother, whose name is now Mary Lebowitz Levy, currently lives in Minneapolis, Minnesota, and has no objection to her adopted daughter's effort to gain access to her birth records.

5. That affiant wishes to obtain access to information about her natural parents primarily for medical reasons; that affiant has one child, an 8 year old boy, who is both mentally retarded and epileptic; therefore, affiant

feels it is essential for her to learn as much as possible about her genetic history.

6. Further, that affiant has sought personal counseling at the Bach Institute in Minneapolis, Minnesota; that Dr. Jerome Bach, M.D., a psychiatrist and the director of the institute, recommended that she attempt to seek out her birth records for reasons pertaining to her mental health.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Barbara Lois Lebowitz Marks
Barbara Lois Lebowitz Marks

Subscribed and sworn to before me
this 4th day of February, 1978.
/s/ Maureen P. Burns
Notary Public
STAMP
Maureen P. Burns
Notary Public-Minnesota
Hennepin County
My Commission Expires Oct. 19, 1984

APPENDIX 2

NOTICE OF FILING

To: John Dienner, III, Esq.
Asst. State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602

Patrick Murphy, Esq.
Goldberg & Murphy, Ltd.
Suite 2300
33 North LaSalle Street
Chicago, Illinois 60602

Please Take Notice that on May —, 1978 I shall file with the Clerk of the Circuit Court of Cook County, Illinois the attached Memorandum in Support of Petition for Review of Sealed Records above entitled cause.

SHARON COVELMAN

Sharon Covelman
Lawndale Legal Services
Legal Foundation of Chicago
911 South Kedzie Ave
638-2343
Chicago, Illinois 60612
6 38-2343

CERTIFICATE OF SERVICE

Sharon Covelman affirms that on May , 1978 she served upon the above named individuals a copy of the foregoing Memorandum in Support of Petitioners' Position in the above entitled cause by depositing said copy in the United States Mail at 900 S. Kedzie, Chicago, Illinois.

SHARON COVELMAN

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REVIEW OF SEALED ADOPTION RECORDS

Petitioner Barbara Lois Lebowitz Marks is a thirty-three year old woman who was adopted in her infancy by Mr. and Mrs. Morris Lebowitz of Minneapolis, Minnesota. Morris Lebowitz, petitioner's adoptive father, died in 1963. Her adoptive mother, Mary Lebowitz Levy, has informed petitioner that she was born on or about August 6, 1944 and that a decree of adoption terminating the parental rights of petitioner's natural parents and adjudging Morris and Mary Lebowitz her adoptive parents was entered on August 17, 1944, in Chicago, Illinois.

Aside from her knowledge of the date and place of the adoption decree's entry, Barbara Marks has no information as to the circumstances surrounding her birth and adoption. (See Affidavit of Barbara Lois Lebowitz Marks attached hereto as Exhibit A). She does not know the identity of her natural parents, their medical histories, or the medical histories of any of their other children. Nor does she have any knowledge of her own medical condition at birth.

Eight years ago, petitioner Marks gave birth to a son. The child has suffered since birth from a brain disfunction and from epilepsy (see Affidavit of Barbara Marks). Petitioner has been informed by doctors who have examined the boy that they are unable at this time to determine the cause of his retardation. The doctors have also told petitioner that there is a distinct possibility that the cause of her son's retardation may be a genetic defect but that this cannot be determined for certain until more is known about her own genetic history. Petitioner seeks access to her adoption records partially because they

may enable her to obtain medical treatment for her son which could result in the improvement of his health and mental development.

A second pressing concern that underlies petitioner's quest for access to her birth records is a fundamental uncertainty about whether she ought to consider giving birth to other children. Petitioner is convinced that she cannot reach an intelligent decision as to whether she ought to bring more children into the world until she knows whether she is a carrier of a genetic defect which would make it likely that they too, would be physically or mentally handicapped.

Finally, petitioner seeks access to these sealed records in an effort to further her own emotional development. For some years now she has been under the care of Dr. Jerome Bach, a licensed psychiatrist practicing at the Bach Institute in Minneapolis, Minnesota. Dr. Bach has diagnosed petitioner as suffering from severe feelings of abandonment. He has noted in petitioner a tendency to retreat into fantansies centered around the mystery of her origin when the strains of daily living weigh heavily upon her. Dr. Bach feels that it would help petitioner greatly in her efforts to overcome this tendency and develop into a responsible adult and parent if she were to learn the history of her earliest childhood and the circumstances surrounding her adoption. (See opinion letter of Jerome Bach, M.D. attached hereto as Exhibit B).

Petitioner in her affidavit, which states that she seeks access to her records "primarily for medical reasons" and Dr. Bach in his opinion letter reject the proposition that her desire to learn more about her family history is predicated on mere idle curiosity.

ARGUMENT

Petitioner's claim to a right to inspect her birth records is premised upon the Illinois statutes mandating the confidentially of such records. Ill. Rev. Stat., Ch. 4, §9.1-8 and Ill. Rev. Stat., Ch. 111½, §73-17(2)(a), and upon the First, Ninth and Fourteenth Amendments to the United States Constitution.

Ill. Rev. Stat. Ch. 4 9.1-8 provides, in part, that:

> "Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may order that the file relating to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order ...."

A companion statute, Ill. Rev. Stat., Ch. 111 1/2 &73-17 (2)(a) 1975 provides that after the decree of adoption is entered:

> "the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certificate except upon order of a court of competent jurisdiction or as provided by regulation . . ."

Finally, Ill. Rev. Stat., Ch. 111 1/2 §73-17(4) directs that:

> "when a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any

> custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection . . ."

Taken together, these three statutes serve as the basis for the present policy and practice of Illinois Courts. At present, all adoption records in Illinois are impounded by the clerk of the court, on the court's own motion, immediately after the decree of adoption has been entered. Adoptees seeking access to these records have no choice but to petition courts in proceedings like this one for permission to view these records.

It is important to note that Ill. Rev. Stat., Ch. 4 § 9.1-8 and Ch. 111 1/2 §73-17(2)(a) provide no standard which might guide a judge in determining whether adoption records ought to be opened for the adoptee's inspection. In Illinois, this decision has been left to the unfettered discretion of the judge. Only one unreported opinion of the Circuit Court of Cook County, *In the matter of Daniel Doe,* 76 C 2436, handed down on November 22, 1977, has confronted the question of whether an adoptee is entitled to view his own adoption records.

In the *Daniel Doe* case, Doe's petition contained allegations that he had been under psychiatric care for eleven years and that his psychiatrist believed that release of information about his origins would alleviate much of the emotional anxiety that he had suffered from the past. The allegations of the petition in *Daniel Doe* were supplemented by an evidentiary hearing during which the petitioner introduced evidence that he had attempted suicide on several occasions. The opinion of the court makes no mention of any countervailing claims to secrecy raised by his natural or adoptive parents.

On the strength of this record, the court in *Daniel Doe* found that Doe had "established a prima facie case for the release of these records by showing by a preponderance of the evidence that he, as an adult, has a 'real and immediate need' for such records." The opinion contained extensive discussion of recent legal challenges to the constitutionality of sealed records statutes, the current trend of opinion among professional psychologists that disclosure of birth records to adoptees is necessary in many instances to insure their development into healthy adults, and the necessity of weighing the competing legal interests of adopted children against the legal interests of their parents in determining the constitutionality of sealed records statutes. The opinion also referred to the possibility that the present Illinois statutes were constitutionally flawed because a) they discriminated against adoptees who might be considered a "suspect class" of people in a position akin to those whose race, lineage, or alienage caused them to be treated more harshly than others under the law; b) they prevented adoptees from receiving vital information, a right protected by the First Amendment; c) they failed to give adequate guidelines as to standards for release of information and persons who required notice before the information could be released and were therefore void for vagueness.

However, after this plenitude of discussion the court in *Daniel Doc* failed to make a finding that the right of an adopted person to knowledge of his or her identity is a fundamental constitutional right protected by the First and/or Ninth Amendments, although such a finding is implied by the court's decision to release the records and its concern about establishing an orderly procedure

for the release of the information sought by the petitioner. In addition, the court failed to clarify the meaning of the "real and immediate need for the release of records" and to set forth the guidelines for what is needed to make a showing of "real and immediate need' for adoption information. The present state of the case law leaves unclear the question of whether it is necessary for petitioner-adoptees to allege a history of severe medical problems complete with a documentary history of treatment by a physician and a physician's opinion that knowledge of family history is essential to the recovery of the patient's health.

Finally, the opinion contains findings that both the natural and the adoptive parents have an interest in the release of the desired information to adoptees and requires that notice be given to both sets of parents before such information is released. Immediately following this pronouncement on the necessity of giving notice and the opportunity to be heard the court concludes that "absent a showing that the adoptive or biological parents will suffer substantial harm, the records shall be released. The burden will be shifted from the petitioner to the adoptive and biological parents to show by a preponderance of the evidence that the harm they will suffer will outweigh any benefit the petitioner might receive." The language of the opinion makes it impossible to ascertain whether absence of "substantial harm to the adoptive or biological parents" is the only showing which must be made to gain access to adoption information or whether the standard is "absence of substantial harm" *and* "real and immediate need" for the records.

It is suggested that the ambiguities in the *Daniel Doe* opinion discussed above must be clarified through the

case law if Illinois law is to meet current constitutional requirements. Lack of clarification will not only subject Illinois statutes to constitutional attack in federal and state courts but also will continue to subject adoptees and their biological and adoptive parents to much burdensome expense and anxiety while these questions are litigated.

Petitioner Barbara Marks urges this court to make an explicit finding that possession of information about one's family heritage and biological and cultural history is a fundamental constitutional right which may not be denied to an adult person. Petitioner's position is supported by a long line of cases upholding the First Amendment right to receive information and ideas. See *Martin* v. *City of Struthers* 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General* 381 U.S. 301, 307-308 (1965); and *Stanley* v. *Georgia* 394 U.S. 557 (1968). Petitioner is aware that *Martin, Lamont,* and *Stanley* all rest upon the theory that the First Avendment guarantees a right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. Additionally, petitioner is aware that neither she nor other adoptees can claim to be isolated in their privacy. She admits that the natural and adoptive parents of adoptees have rights to privacy which the state is justified in attempting to protect, to a limited extent. However, she maintains that the interests of the natural and biological parents in secrecy are outweighed in her case by her own interest in the opportunity to develop her personality to a point where she herself may be able to act as a responsible parent and healthy member of the community. In denying petitioner this opportunity, the court would be denying her many of "unenumerated rights" found

to inhere in the penumbra of the First Amendment and discussed by the Supreme Court in *Griswold* v. *Connecticut* 381 U.S. 479, 482 (1965):

> "By *Pierce* v. *Society of Sisters* . . . the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer* v. *Nebraska* . . . the same dignity is given the right to study the German language in private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read [citation omitted] and freedom of inquiry, freedom of thought, and freedom of teach [citation omitted]—indeed the freedom of the entire university community [citations omitted]. Without these peripheral rights the specific rights would be less secure.

If petitioner's claim that a knowledge of her identity is a fundamental right protected by the First and Ninth Amendments is accepted, the Illinois sealed records statutes must be found to represent a compelling state interest and be narrowly drawn in order to be found constitutional. See *Roe* v. *Wade,* 410 U.S. 113, 155 (1973) and *Sherbert* v. *Verner* 374 U.S. 398, 406 (1963). Petitioner contends that while these statutes may represent the Illinois legislature's concern with the preservation of the family unit, "perhaps the most fundamental social institution of our society" cf. *Trimble* v. *Gordon,* 430 U.S. 762 (1977) any interpretation which does not permit opening of the records to an adult adoptee on a showing

of "real and immediate need" not necessarily to include proof of a history of physical or mental illness is not narrowly drawn enough to satisfy constitutional requirements.

Petitioner's position is bolstered by *Thorpe* v. *Thorpe* 48 Ill. App. 2d 455, 198 N.E. 2d 743 (1962), *Stolder* v. *Stone* 412 Ill. 488, 107 N.E. 2d 696; and *Petition of Perl* 38 Ill. App. 2d 430, 187 N.E. 2d 303 all of which interpret Section 15 of the Illinois Adoptive Act. Ill. Rev. Stat., Ch. 4, §9.1-15 as providing that "the question of paramount importance in any adoption proceeding is what will be in the best interest of the child." *Thorpe* v. *Thorpe, supra* at 462. Petitioner contends that while the interests of the child during minority may be best served by withholding from the child the identity of his parents, thus allowing the child to develop love and affection for the adoptive parents without competition from other sources, once this development has taken place and the child is able to grapple with the notion that he may have another set of relatives who may possess information about him that he deems valuable, his best interests are served by the expeditious release of the desired records.

CONCLUSION

What is needed in Illinois is not only a clearer articulation of the standards which an adoptee must meet in order to gain access to his or her records but also a method of insuring that such access can be obtained easily and without resort to lengthy and burdensome litigation

Petitioner proposes that Illinois adopt some features of the method proposed by the New Jersey Superior Court in *Lovallo* v. *New Jersey State Registrar* C-3349-75 (1977).

In that opinion the court held that "where a natural parent has consented [to disclosure of the records] disclosure should be automatic. Additionally, that court held that "if the adoption agency or the biological parent refuses to consent to the divulgence of identifying data, the adoptee shall have the right to appeal to the court." Finally, where the investigation of an adoption agency fails to locate the natural parents, the *Lovallo* decision allows the adoptee " to appeal to the court for the information necessary to carry on the search."

With the establishment of criteria for the release of adoption information and a workable procedure for releasing the information, Illinois will have moved into the vanguard of states who have abandoned the principle of confidentiality for confidentiality's sake and moved closer to recognizing the rights of its adopted citizens.

/ s/ Sharon L. Covelman

Sharon Covelman
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

STATE OF MINNESOTA)
) ss AFFIDAVIT
COUNTY OF HENNEPIN)

BARBARA LEBOWITZ MARKS, being first duly sworn on oath, deposes and says:

1. That her true and correct name and address are as follows:

Barbara Lois Lebowitz Marks
5704 Winnetka Avenue North
New Hope, Minnesota 55428

Further, that to the best of her knowledge, she was born on August 6, 1944, in Chicago, Illinois.

2 That she has no information as to the exact place or circumstances of her birth.

3. That a decree of adoption was entered on August 17, 1944, in Chicago, Illinois; that the attorneys involved in the adoption are believed to have been Samuel Finkelstein, of Minneapolis, Minnesota, and the late B. Hamilton Edison, of Chicago, Illinois.

4. That affiant's adoptive parents were Morris and Mary Lebowitz, of Minneapolis, Minnesota; that her adoptive father, Morris Lebowitz, died in 1963; that her adoptive mother, whose name is now Mary Lebowitz Levy, currently lives in Minneapolis, Minnesota, and has no objection to her adopted daughter's effort to gain access to her birth records.

5. That affiant wishes to obtain access to information about her natural parents primarily for medical reasons; that affiant has one child, an 8 year old boy, who is both mentally retarded and epileptic; therefore, affiant

feels it is essential for her to learn as much as possible about her genetic history.

6. Further, that affiant has sought personal counseling at the Bach Institute in Minneapolis, Minnesota; that Dr. Jerome Bach, M D., a psychiatrist and the director of the institute, recommended that she attempt to seek out her birth records for reasons pertaining to her mental health.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Barbara Lois Lebowitz Marks
Barbara Lois Lebowitz Marks

Subscribed and sworn to before me
this 9th day of February, 1978.
/s/ Maureen P. Burns
Notary Public

STAMP
(Letterhead)

THE BACH INSTITUTE

Human Systems
Family Community Business

May 10, 1978

To Whom It May Concern:

RE: Barbara Marks

We have been working with Barbara Marks in her emotional growth and development for approximately 2 years. We believe that it is essential for her at some point in her course in therapy to know the origins of her birth and to know something about the nature of the family from which she came, be it individual or couple,

including past generations. It is not a frivilous or an idly curious experience that we are asking her to have. We are insistent that she has a continuity within herself that allows her to be an effective, functioning mother and appropriately healthy woman in order to be an effective person for her child. She will need to know more about her childhood and origins than she has been so far able to determine. She needs, at some point, to uncover all the secrets in her life so they can put to rest and not continue to be the source of fantasy, idealized romance, or place to retreat when her current realities become overwhelming. It is our therapeutic belief that at some point it will be important for her to know about those natural origins. We strongly support her petition to have those records examined in a therapeutic setting.

Our experience is in the area of family theory and family practice. I am a Family and Child Psychiatrist, Associate Clinical Professor, University of Minnesota Medical School, Department of Psychiatry, where I teach medical students, post graduate fellows in psychiatry and child psychiatry. I'm also Adjunct Professor of Law and Medicine, University of Minnesota Law School, where I teach courses in Family Law. I also work as an ongoing consultant with adoption and foster placement agenceis, including national agencies, such as Children's Home Society, and have been very involved for the past 15 years in the areas of adoptions and placements, being aware of both the legal, emotional, psychological aspects of discovering one's parenthood.

I hope her petition is granted and that therapeutically, the information shared will be used to, when it is fitting, for the progress she is making and not as a premature experience in just collecting old information.

Sincerely yours,

/s/ Jerome M. Bach, M.D.
Jerome M. Bach, M.D.
Medical Director

JMB/gh 628 Nicollet Mall, Room 60, Minneapolis, Minnesota 55402. Telephones (612) 339-1777 or 588-1101

Supreme Court, U. S.
FILED
JUN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-1428

YESTERDAY'S CHILDREN, A Not-For-Profit Corporation, CYNTHIA DOE, JEANINE DOE, BEVERLY DOE, JUDY DOE, KAREN DOE, M. JANE DOE, VERONICA DOE, JAMES DOE,

Petitioners,

- VS -

MARGARET KENNEDY, Director, Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, PAUL Q. PETERSON, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk, Cook County, and WILLIAM SCOTT, Attorney General of Illinois,

Respondents.

REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

Patrick T. Murphy, Esq.
GOLDBERG & MURPHY, LTD.
33 N. LaSalle - Suite 2300
Chicago, Illinois 60602
312/782-4530

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. _____

YESTERDAY'S CHILDREN, et al., - - - Petitioners,

- VS -

MARGARET KENNEDY, et al., - - - - - Respondents.

REPLY OF PETITIONERS TO BRIEF FOR
RESPONDENTS IN OPPOSITION

In their Brief in Opposition, the Respondents state at page 5:

> "Considerations of equity, comity and federalism -- mandate abstention in the instant case, especially because there is a pending State Court action seeking resolution of substantially the same issues raised by Petitioners below."

In a footnote to that statement the Respondents point out that a case was filed in the Circuit Court of Cook County (In The Matter of Marks, et al.) which "asked for a clarification of the standards needed to unseal Illinois adoption records as articulated In The Matter of Daniel Doe ---." The Respondents then point out the same attorney who represents the Petitioners herein is also counsellor of record in the case which they claim raises the same issues as are being litigated herein.

The statement that the issues raised in Marks are substantially the same as here is erroneous.

1. In the brief one page Petition filed in Marks, (See Appendix 1, pp. 1a and 2a of the Brief For Respondents In

Opposition) the Plaintiffs nowhere raise or argue any constitutional issue. Indeed, the PRAYER quite simply asks that the record be opened to each of them so that they can begin to determine who their natural parents are.

2. Although the Respondents argue that the Memorandum of the attorneys for one of the Petitioners in Marks, a lawyer for the Legal Assistance Foundation of Chicago, does raise the constitutional question, a perusal of her Brief which is included in the State's Appendixes at pp. 6a through 15a will indicate that while she discusses the constitutional question she does not argue that the present Illinois statutory scheme is unconstitutional.

3. The respondents apparently inadvertently forgot to allude to, or file as

an Appendix, the Brief of the attorney (lead counsel in Marks) for three of the Petitioners in Marks (who is also the attorney for the Petitioners herein.* That Memorandum quite explicitly states:

> "For that reason (along with the reason that a case concerning the constitutional issues is now pending in front of the United States Supreme Court), Petitioners herein do not raise the question of the constitutionality of the statutes. The Petitioners merely argue that a reasonable interpretation of the statutory scheme would be that an adult adoptee, alone, is entitled to view his or her own personal records.**

* The Respondents seem to imply here as they did in the Court of Appeals that since counsel here is also of record in a State Court matter involving adult adoptees - though with different parties and issues - that somehow abstention is relevant. Such a position is not only without precedent but also would be disastrous financially for the lawyers who have a reputation in certain areas of law and hence attract certain types of clients.

** A copy of the original Complaint is attached herein as Appendix 2. (In the Petition for Certiorari the Complaint is referred to as Appendix 3 but inadvertently was not included as Appendix 3).

4. A reading of the Petition in Marks and the Memorandum included as an Appendix herein makes it obvious that the issues in Marks and the issues here are entirely different. However, the issues raised in Marks - as were the issues raised in Doe (See Petition for Writ of Certiorari at pp. 22-24) do underscore the problems faced by adult adoptees who attempt to obtain a glimpse of their court and birth records.

The issue presented herein is whether an adult adoptee can obtain access to his or her court and birth records without employing the expensive, time consuming and normally fruitless task of litigation.

The Petitioners in Marks - as the Petitioner in Doe - have had to expend energy, time, money and probably have to endure - as did Doe - humiliation - in an

effort to obtain their records. Indeed, that the Petitioners in Marks are attempting to do is no different than what other adult adoptees have been attempting to do for years. As the Petitioners herein pointed out at paragraph 27 of their Complaint,

> "Over the years, Plaintiffs and other adoptees have sought unsuccessfully through, the courts, Bureau of Vital Statistics, and private agencies to determine the identity of natural parents and family. In Cook County, on only several occasions have adult adoptees been able to view their files, and then only if they can demonstrate critical medical reasons to justify their request."

CONCLUSION

The Respondents' argument that the issues being litigated herein have been - or are being - raised in State Court proceedings is simply inaccurate. The fact that the same attorney is representing

three clients presently and one previously (Daniel Doe) who wish to obtain their records by employing litigation and all the problems and financial strains attendant thereto is irrelevant to the question of whether it is unconstitutional to force adult adoptees to bear the burden of litigation to attempt to obtain their records.

For reasons stated in the Petitioners Petition for Writ of Certiorari, they respectfully ask that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

PATRICK T. MURPHY

GOLDBERG & MURPHY, LTD.
33 N. LaSalle - Suite 2300
Chicago, Illinois 60602
(312) 782-4530

APPENDIX I

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS

COUNTY DEPARTMENT, COUNTY DIVISION

IN THE MATTER OF)
)
BARBARA LOIS LEBOWITZ MARKS,) NO. 78 CO 307
et al.

MEMORANDUM IN SUPPORT OF PETITIONERS' POSITION

The Petitioners, all adopted as infants, are presently adults who are attempting to view their court and birth records to determine if there is information in these records which would lead them to discover any biological family they might have. Such a family, obviously would include not only parents, but grandparents and brothers and sisters. Presently, Illinois law provides that "--the Court may order that the file relating to such proceedings shall be impounded by the Clerk of the Court and shall be opened for examination only upon special order

of the Court--". Ill. Rev. Stat. Ch. 4, §9.1-18 (1977). A substantially similar provision is contained in the Vital Records Act for the inspection or certification of an original Birth Certificate. Ill. Rev. Stat. Ch. 111 1/2, §73-17 (1977). The Petitioners herein have no argument with these provisions insofar as they stand. Nor do the Petitioners raise any constitutional question concerning the right of the Court to impound the records of an adopted individual.

However, a reasonable interpretation of the above statutes is that such records are to be impounded from all parties except the adult adoptee. Quite obviously the Legislature had a purpose in excluding other parties from viewing the records of an adopted party. However, the Legislature would have no purpose in excluding the records from the adult adoptee. Indeed, nowhere else in Illinois legislation are their provisions

for excluding the adult individual from viewing records concerning him or herself where such records would not be a harm to the individual himself.* Any interpretation of the above statutes which would exclude adult adoptees would probably run aground of the United States and Illinois Constitutions. For that reason (along with the reason that a case concerning the constitutional issues is now pending in front of the United States Supreme Court), Petitioners herein do not raise the question of the constitutionality of the statutes. The Petitioners merely argue that a reasonable interpretation of the statutory scheme would be that an adult

* The apparent reason advanced by some individuals for interpretting the statute so as to prevent adult adoptees from viewing their records is that harm would be done either to the natural or adopted parents.

adoptee, alone, is entitled to view his or her own personal records.**

For the reasons above stated the Petitioners herein respectfully ask that this Court give them immediate access to their birth and court records surrounding their birth and adoption.

Respectfully, submitted,

PATRICK T. MURPHY
GOLDBERG & MURPHY, LTD.
33 N. LaSalle - Suite 2300
Chicago, Illinois 60602

** Indeed, the Assistant State's Attorney assigned both to this cause and to the Federal cause admitted to the United States Court of Appeals during oral argument in the case of Yesterday's Children, et al. v. Margaret Kennedy, et al., No. 77-1870 that adulthood might well be a good cause for opening the records to the adult adoptee. For a more detailed analysis of the constitutional questions (which is not raised by Petitioners herein) the Petitioners attach a Memorandum of Law previously filed by other Plaintiffs in the Yesterday's Children case in Federal Court.

In The
UNITED STATES DISTRICT COURT
For The
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

YESTERDAY'S CHILDREN, A Not-for-Profit Illinois Corporation, Cynthia Doe, Jeanine Doe, Beverly Doe, Judy Doe, Karen Doe, M. Jane Doe, James Doe, On behalf of themselves and a class of individuals too numerous and transitory to mention,

Plaintiffs,

vs.

MARY LEE LEAHY, Acting Director Illinois Department of Children and Family Services, HARRY COMERFORD, Presiding Judge, County Division, Circuit Court of Cook County, JOYCE LASHOFF, Director, Illinois Department of Public Health, STANLEY KUSPER, Clerk of Cook County, WILLIAM SCOTT, Attorney General of Illinois,

Defendants.

COMPLAINT

PRELIMINARY STATEMENT

This is a Complaint filed individually and on behalf of all individuals who were adopted pursuant to Illinois law, who are now adults and who wish to obtain and/or have an opportunity to view, upon presentation of proper identification, records identifying their natural parents, background, extended family and any other pertinent information. Illinois law presently allows any party to an adoption proceeding to move that the records be sealed and remain so absent a Court Order. For over 25 years all adoption records have been customarily sealed in Cook County and for the past two years there has been a general Court Order to that effect. Traditionally information has been afforded to adoptees only upon proof of serious and probably hereditary medical problems. (However, even absent this custom and action the mere threat of action and the necessity for the Plaintiffs to endure long and expensive litigation to determine their identity creates a breach of Plaintiffs' constitutional rights.)

There are three sets of records the Plaintiffs contend that they are automatically entitled to without court action: (1) the original court file, (2) the original birth certificate, and (3) records from the private adoption agency if one were involved.

The Plaintiffs assert that the continued concealment by statutory fiat and State action of their identities deprives them of cherished constitutional protections and rights which are afforded to other citizens.

The last names of all but the corporate Plaintiff have been eliminated from the Complaint (though they are available to the Court and the Defendants). The Plaintiffs are requesting for purposes of written documents such names remain anonymous inasmuch as in many cases their adoptive parents for whom the Plaintiffs feel gratitude and filial affection would be disturbed by their present action.

I

JURISDICTION AND VENUE

1. This is an action for injunctive and declaratory relief to protect the Plaintiffs constitutional rights protected by the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution.

2. Subject matter jurisdiction is

vested in this Court pursuant to 42 U.S.C., 1983, Art. 28 U.S.C., 1342(3); to grant declaratory and further relief under 28 U.S.C., 2801 and 2802; to grant injunctive relief under 28 U.S.C., 2281 and 2284.

3. Venue is conferred upon this Court because the cause of action arose in the Northern District of Illinois and most of the Plaintiffs and Defendants reside there.

II

TYPE OF PROCEEDING

4. Plaintiffs seek a judgement declaring that Ill. Rev. Stat. Ch. 4, §9.1-18 unconstitutional inasmuch as its force and effect deprive Plaintiffs of their rights as protected by the First, Fifth, Ninth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution.

5. Plaintiffs seek a judgement de-

claring that action of State officials and of officials of private agencies acting under the color of State law in preventing the Plaintiffs from ascertaining their true identity are in violation of the Plaintiffs' rights secured by the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments of the United States Constitution.

6. Plaintiffs seek a judgement declaring that Ill. Rev. Stat. Ch. 111 1/2,§73-17(2)(a) and (4) is unconstitutional inasmuch as its force and effect deprive the Plaintiffs of their rights as protected by the First, Fifth, Ninth, Thirteenth and Fourteenth Amendments to the U.S. Constitution.

7. Pursuant to authority of 28 U.S.C., 2281 and 2284 and 42 U.S.C., 1983, Plain-

tiffs seek an order permanently enjoining Defendants, their officers, agents and employees from preventing the Plaintiffs from viewing Court files pertinent to them (the Plaintiffs), from denying Plaintiffs access to their original birth certificates and from denying Plaintiffs access to such files in private agencies as will assist Plaintiffs in determining the identity and whereabouts of their natural parents.

III

RELEVANT STATUTES

Ill. Rev. Stat. Ch. 4, §9.1-18:

> 9.1—18. § 18. Records confidential.) The word "illegitimate" or the words "born out of wedlock", or words importing such meaning, shall not be used in any adoption proceeding in any respect.
>
> Upon motion of any party to an adoption proceeding the court shall, or upon the court's own motion the court may, order that the file relating to such proceeding shall be impounded by the clerk of the court and shall be opened for examination only upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file. Certified copies of all papers and documents contained in any file so impounded shall be made only on like order.

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Ill. Rev. Stat. Ch. 111 1/2, §73-17(2)(a):

> (a) Thereafter, the original certificate and the evidence of adoption, paternity, legitimation, or sex change shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation.

Ill. Rev. Stat. Ch. 111 1/2, §73-17(4):

> (4) When a new certificate of birth is established by the State Registrar of Vital Records, all copies of the original certificate of birth in the custody of any custodian of permanent local records in this State shall be transmitted to the State Registrar of Vital Records as directed, and shall be sealed from inspection.

IV

PARTIES

8. "Yesterday's Children" is a not-for-profit Illinois Corporation consisting of approximately 450 adults who were adopted as infants.

9. Cynthia Doe was adopted in 1952 through the Illinois Children's Home and Aid Society (hereinafter ICH&A). She was abandoned by her natural parents at the age of three and placed under state guardianship through the Juvenile Court. The

State placed her with ICH&A. ICH&A later put her in the home of her adoptive parents. When Cynthia was 21 she discovered that she had a younger brother also abandoned by her parents and placed by the State with ICG&A. That agency placed him in a separate adoptive home. Cynthia became increasingly anxious concerning her brother, and finally went to ICH&A and sought their assistance in determining his whereabouts. Officials at the agency rebuffed her persistent requests and told her that her brother's whereabouts were none of her business.

10. Plaintiff Jeanine Doe was adopted in 1949 through the Catholic Charities. She attempted to discover her parents' identity from that agency in 1974. Social workers at Catholic Charities refused to

divulge the names of her natural parents though they did indicate the ethnic background, age, and physical description of her mother, and a little of her father's background. She has not attempted to get information through the courts, realizing that it would be fruitless.

11. Plaintiff Beverly Doe was adopted in 1939 through The Cradle. She has sought information regarding her parents from this agency, but was given only background information about them. She has not attempted to petition the Court.

12. Plaintiff Judy Doe was adopted in 1942 through The Cradle. When she attempted to discover her natural parents' identity, she was scolded by employees at The Cradle for being ungrateful, and refused information. She has not sought

Court assistance.

13. Plaintiff Karen Doe was adopted in 1941 through the Chicago Foundling Home. Twice she attempted to obtain information regarding her natural parents' identity from this agency. She was denied information on both occasions and received a scolding once concerning her alleged ingratitude. She has made no effort to obtain Court assistance.

14. Plaintiff Jane Doe is a resident of New Mexico presently but was adopted in Chicago through the Chicago Foundling Home in 1946. She attempted to obtain information regarding her natural parents in 1974, but the Foundling Home refused her request. She has made no effort through the Courts.

15. Plaintiff Veronica Doe was adop-

ted in 1939 through St. Vincent's Orphanage. She has never attempted to ascertain her parents' identity either through the agency or the Courts.

16. Plaintiff James Doe was adopted in 1945 through Catholics Charities. He tried to determine the identity of his natural parents through the hospital where he was born, but was told by administrators that the law forbade it. Later he went to Catholic Charites where he was told that he could receive background information on his parents only for mental or medical reasons but even then the names could not be divulged. He wrote the Department of Public Health, but received only his adoption birth certificate. He has not sought assistance from the Courts.

17. The Plaintiffs bring this suit on

their own behalf, and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all other adult adoptees affected by the laws and actions complained of herein. The members of the class are so numerous as to make it impracticable to bring them before the Court. Common relief is sought for all - the ability (if they so desire) to discover the identity of their parents. The interests of the class are adequately represented by the Plaintiffs. A determination that the aforementioned statutes are unconstitutional and permanent injunctions against both their enforcement and the actions done under color of State law will be depositive of the interests of other members of the class.

18. Defendant Mary Lee Leahy is the

Acting Director of the Illinois Department of Children and Family Services, and as such is responsible for licensing the child welfare adoptive agencies and condoning their refusal to divulge names of natural parents and other background information to adoptees.

19. Defendant Harry Comerford is the Presiding Judge of the County Division of the Circuit Court of Cook County, and as such is administratively responsible for assuring that adoption records are - and remain - sealed not only as against the public, but as against adult adoptees as well.

20. Defendant Stanley Kusper is the Clerk of Cook County and as such is responsible for sealing the original birth certificates of adoptees, and also refusing

to give adult adoptees copies of their original birth certificates.

21. Defendant Joyce Lashoff is the Director of the Illinois Department of Public Health and as such is responsible for enforcing provision of Ill. Rev. Stat. Ch. 111 1/2, §73-17(2)(a) and 73-17(4).

22. Defendant William Scott is the Attorney General of Illinois, and as such is the chief law enforcement officer and responsible for enforcing the provisions of the aforementioned statutes.

V

FACTUAL ALLEGATIONS

23. The State of Illinois, both by statute and through the actions of State officials acting under the color of State law, has discriminated against individuals who were adopted as infants. Knowing

one's natural parents, ancestors and family background is an important right. Children who are not adopted - or who are adopted at a later stage in life - of course know who their parents are. This is true whether the parents are good, kind and loving, or cruel, despotic, neglectful and rejecting. The children can also discover who their extended family are, again regardless of the acceptance or rejection of individual aunts, uncles, counsins, grandparents, etc. However, Illinois has maintained a statutory and actual policy of preventing adopted children from discovering the names and circumstances of their natural parents and relatives, and the facts surrounding their birth and adoption.

24. Ill. Rev. Stat., Ch. 4, §9.1-18

mandates that "--upon the motion of any party to an adoption proceeding the Court shall, or upon the Court's own motion the Court may, order that the file relating to such proceeding shall be impounded by the Clerk of the Court and shall be opened for examination only upon specific order of the Court; which order shall name the person or persons who are to be permitted to examine such file --". For over 25 years it has been Cook County Court policy automatically to seal such files. For the past two years there has been a general court order, issued by Defendant Comerford, that such files be automatically impounded. Of course without this court procedure files can be sealed by the request of any party.

25. Once such files are sealed then

a new birth certificate is issued, "--and the original certificate and the evidence of adoption -- shall not be subject to inspection or certification except upon order of a court of competent jurisdiction or as provided by regulation." (Ill. Rev. Stat., Ch. 111 1/2, §73-17(2)(a)(1973), see also §73-17(4)). The result is that adoptees who have reached adulthood can not obtain their original birth certificates.

26. Adoption agencies formalized by statute (Ill. Rev. Stat. Ch. 23, 2212. 08) and licensed by the employees of Defendant Leahy (Ill. Rev. Stat., Ch. 23, §2214) have customarily denied adoptees access to their records.

27. Over the years, Plaintiffs and other adoptees have sought unsuccessfully

through the courts, the Bureau of Vital Statistics, and private agencies to determine the identity of natural parents and family. In Cook County, on only several occasions have adoptees been able to view their files, and then only if they can demonstrate critical medical reasons to justify their request.

28. As was pointed out in paragraphs 8 through 15 of this Complaint, most of the Plaintiffs have unsuccessfully sought assistance of and permission from their adoption agencies in their quest. In each case they were rebuffed, sometimes in a cruel fashion. The named Plaintiffs herein have not petitioned the courts for such records realizing that such a petition would be time-consuming, expensive, and fruitless (since none had apparent

medical reasons for such a search).

29. Yesterday's Children is a not-for-profit Corporation founded in May, 1974, and incorporated in July of the same year. Members and officers of Yesterday's Children have attempted since May, 1974, to persuade Illinois officials to review and change the policy of forbidding adoptees from viewing their records and discovering the identity of their parents. They have written each of the 104 child welfare agencies in Illinois dealing in adoptions. Eleven of these agencies responded. Most of the responses were to the effect that the agencies would be happy to meet with Yesterday's Children, but that they could reveal no information because the law forbade it. Officers of

Yesterday's Children have met and discussed the issues with various officials of these agencies, but the response has always been the same.

30. Yesterday's Children wrote to each Illinois State legislator concerning the problems and their wish for change. They received one response.

31. Officers and members of Yesterday's Children met with Defendant Leahy and her predecessor, Dr. Jerome Miller, in an attempt to have DCFS policy regarding secrecy surrounding adoptions and licensing reviewed. Both Defendant Leahy and Dr. Miller indicated that they understood the plight of adult adoptees but apparently nothing has been done.

32. Officers and members of Yesterday's Children have spoken with Defendant

Comerford on approximately 12 occasions, have written him twice, and met personally with him once. Defendant Comerford has indicated an awareness of the problem, but apparently believes, absent serious medical or psychological reasons, adults adopted as children should have no access to their records.

VI

RIGHTS VIOLATED

INTRODUCTION

There are two ways in which the constitutional rights of the Plaintiffs have been violated: (1) by the statutes themselves and (2) by the action of State officials and private child adoption agencies acting under the color of State law. (1) The statutes (Ill. Rev. Stat., Ch. 4, §9-1-18, §73-17 (2)(a) and (4) violate Plaintiffs'

rights because they allow the courts, the adoptive parents, the adoption agency or the natural parents to move to seal such records from the adoptee. (2) The State and private agency officials (acting pursuant to licensure by Defendant Leahy and her predecessors) have pursuant to the aforesaid laws woven a web of secrecy over all aspects of an adoption to the detriment of the Plaintiffs and other members of their class.

33. The State of Illinois has denied the Plaintiffs their Fourteenth Amendment rights to the equal protection of the laws by preventing their access to information concerning their background, based on the suspect classification of their status as adoptees.

34. The Plaintiffs' rights to acquire

useful information (including the right to determine their natural heritage) have been violated. These liberties are protected by a penumbra of rights emanating from the Bill of Rights, specifically the First, Fifth, Ninth and Fourteenth Amendments of the U. S. Constitution.

35. The Plaintiffs' rights to be free from involuntary servitude as protected by the Thirteenth Amendment to the U.S. Constitution have been violated by the statutes and actions complained of. As adopted infants the Plaintiffs were placed into a chattel status - an unfortunate but explicable happenstance. However, the State's continued insistance on maintaining that chattel status even into adulthood and until death violates the Plaintiffs' Thirteenth Amendment Rights.

VII

INJURY

36. Because of the legislation and action of the State of Illinois, the Plaintiffs and members of their class have been denied convenient access to knowledge of their natural heritage. This alone amounts to an unconscionable and unconstitutional affront to their dignity. Besides this, many adoptees have suffered psychological trauma from being denied knowledge of who they are. There is also a potential financial injury, since under Illinois law asoptees may be entitled to inherit from the intestate estates of their natural parents and are also entitled under some circumstances, to financial support by their natural parents.

VIII

RELIEF REQUESTED

37. The Plaintiffs respectfully ask:

(1) That a Three-Judge Federal Court be convened to hear and determine this action pursuant to 28 U.S.C. 2281 and 2284.

(2) That such Court after a hearing declare that Ill. Rev. Stat., Ch. 4, §9.18 (1973), Ch. 111 1/2, §73-17(2)(a) and Ch. 111 1/2, §73-17(4) are in violation of the Plaintiffs' rights as protected by the Constitution of the United States and are therefore void and of no effect.

(3) That such Court enter a judgement permanently enjoining the Defendants, their officers, agents and employees from giving force to the aforesaid statutes and from denying Plaintiffs access to any and all files in the possession of

any agency or Court operating pursuant to, or under the color of, State law, which files relate to the background, heritage, and identity of the natural parents and families of adopted persons.

Respectfully submitted,

Patrick T. Murphy
Attorney for Plaintiffs

YESTERDAY'S CHILDREN
P.O. BOX 1554
EVANSTON, ILLINOIS 60204
(312) 864-1377

DONNA CULLOM – President

As a member of the board of directors of the organization, Yesterday's Children, I am pleased to send you the enclosed information concerning this organization. Our organization is concerned with child welfare practice and child welfare laws in the state of Illinois.

The majority of our membership are adults who were adopted children. Since adoption agencies both reflect and influence thinking which affects the plight, and rights, of adult adoptees, Yesterday's Children would like very much to have a mutually satisfying association with Illinois adoption agencies.

Yesterday's Children is interested in hearing your ideas. We'd like to determine how we might work together to modify the existing situation, whereby adult adoptees are denied access to the information pertaining to their own births and adoptions.

Would you please share with us your current thinking and practice concerning the sharing of biological history from your records? We are interested in your thoughts concerning the rights and the needs of the individuals within the adoption complex, and particularly your reservations in relation to a change in law that would give adult adoptees access to their own history.

Times have changed. And we believe social thinking should change with the times. It is our hope that we can work together to meet the needs of all of the parties to adoption while at the same time protecting the rights of each.

We will look forward to hearing from you, and hopefully to a meeting with you in the near future. If you would be interested in meeting with representatives of our group to discuss these problems, we would like to arrange such a meeting.

Cordially,

YESTERDAY'S CHILDREN
P.O. BOX 1554
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DONNA CULLOM – President

YESTERDAY'S CHILDREN is an organization of adults dedicated to the proposition that every person has a right to knowledge of his own historical past. The majority of members of the organization are people who have been separated from their natural families through foster care or adoption, divorce or the death of parents. During their childhood they have known substitute parents and the knowledge of their original parents and family history has been lost to them through unwise social practices and the laws fostered by those practices. Membership in YESTERDAY'S CHILDREN is not, however, limited to people who have experienced a separation from their natural families, but is open to all who understand and support the need of people to incorporate knowledge of their own forbears into their lives today.

Social welfare practices have evolved from a lack of understanding of the importance of being rooted in a history of one's own. Children separated from their natural families have suffered a deep, personal loss in the process of the destruction of their true identity. They have been deprived of the sense of continuity in life that comes from knowing how one is a part of the history of man...the sense of continuity that can be achieved only by knowing how one is a part of one's own biological family.

YESTERDAY'S CHILDREN propose that it is a universal human need to know your own true identity and the identities of your forbears. We propose that because it is a human need, it should be recognized that it is a human right to meet that need. We believe that current social practices and current state laws that prohibit adults from learning their own identities and histories are a violation of human rights and a violation of civil rights under our Constitution. We believe that every adult should have access to the recorded information concerning his own history and his separation from his own natural family.

The purposes of the organization are threefold. We propose to work to amend state law to recognize the right of the adult to the information that concerns him; we propose to speak out in behalf of children currently growing up in adoption or foster care; and we propose to offer counsel and assistance to adults seeking their own historical roots.

Therefore, we will actively oppose the state laws that have sealed the records that contain the biological history of the child who has been separated from his natural family. YESTERDAY'S CHILDREN will conduct monthly meetings for the purposes mentioned and we will initiate activities directed toward fulfilling the purposes of the organization. All members will receive the newsletter of the organization and will be entitled to participate in the activities of the organization. In addition, we will hold regular Search Workshops for the purpose of assisting individual members with their individual searches

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It is not the conviction of the membership of YESTERDAY'S CHILDREN that adoption and foster care are, of themselves, wrong. But it is our belief that these relationships have been gravely damaged and unhappily burdened by the attempt to destroy the evidence of the child having any existence before his separation and relocation. We believe that the success and mutual satisfaction in any relationship depends upon honesty, openness and trust. While it may meet adult needs to structure foster family relationships to exclude other parents and a different biological heritage, it does not meet the needs of the people to whom it is done. All people need a reality of their own. As adults, they demand to know about themselves what their parents have always known about themselves.....who they are and where they came from.

For further information or membership application, please contact:

YESTERDAY'S CHILDREN
P.O. Box 1554
Evanston, Illinois 60204